Law Department

Towards a Europeanised Judiciary? Practitioner's Experiences of National Judges with the Europeanisation of Private Law

SONJA FEIDEN
and
KRISTINA RIEDL (eds)

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Foreword

This Working Paper has been edited by a group of present and former EUI research students who all work in the field of European private law. The formation of this group was furthered by two seminars on the Europeanisation process we held jointly in the last years and 'formalised' following a conference on '*Private Law Adjudication in the European Multi-Level-System*' on 2-3 October 1998 at the EUI. The editing of the contributions to that conference was for a long time at the centre of the group's activities. But during the editing process the group again and again mutated to a deliberative forum on which ever new dimensions of the Europeanisation problem became apparent and inspired lively debates. We are quite confident that these co-operative efforts have very productive side-effects on individual research projects. The 'Working Group on the Europeanisation of Private Law' hopes to soon dispose of a website of its own and hopefully establish new links with its European environment.

Florence, May 2000

Marie-Jeanne Campana *Christian Joerges*

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Abbreviations

a.o.	and others
CCE	Communauté Commerciale Européenne
CE	Communità Europea / Communauté Européenne
cf	compare
CJCE	Cour de Justice des Communautés Européennes
CMLR	Common Market Law Review
Corr.giur.	Corriere Giuridico (= Italian law review)
Court de Cass.	Court de Cassation
c.p.c.	Codice di Procedura Civile
CS	European Coal and Steal Community Treaty
D.Lgs.	Decreto Legislativo (governmental decree)
Dir.com.sc.int.	Diritto communitario e degli scambi internazionali (= Italian law review)
e.g.	for example
EC	European Community Treaty
ECJ	European Court of Justice
ECR	European Court (of Justice) Report
ed al	ed alteri (and others)
ERPL	European Review of Private Law
ff.	following
Foro It.	Il Foro italiano (= Italian law review)
Gazz.Uff.	Gazzetta Ufficiale (= Official Journal of the Republic of Italy)
Giorn.dir.amm.	Giornale di diritto amministrativo (= Italian law review)
Giur.cost.	Giurisprudenza costituzionale (= Italian law review)
Giur.it.	Giurisprudenza italiana (= Italian law review)
GmbH	Gesellschaft mit beschränkter Haftung
i.e.	id est (that is to say)
ibid	ibidem (in the same place)
JO	Journal Officiel des Communautés Européennes
No	Number
OJ	Official Journal of the European Community
op cit	opiter citum (in the work cited)
S.O.	Supplemento Ordinario
p./pp.	page/ pages
Rec.	Recueil (Report of the ECJ)
Riv.(it.)dir.pubbl.com.	Rivista (italiana) di diritto pubblico e commerciale
Riv.dir.civ.	Rivista di diritto civile
Riv.dir.comm.	Rivista di diritto commerciale
Riv.dir.int.	Rivista di diritto internazionale
US	United States
v	versus (against)
vol.	volume

INTRODUCTION

This is the second Working Paper with contributions to a workshop held in Florence in October 1998 entitled somewhat ambitiously "Private Law Adjudication in the European Multi-Level System". An important objective of this event was to contrast academic debate on the 'Europeanisation of Private Law' with the experiences of judges and other practitioners. The conference proceedings are published in a special issue of the *European Review of Private Law*.[1] But since both the initiatives of legal scientists and practitioners working on the harmonisation of private law - represented in the first Working Paper[2] - and the statements of the national judges each form a self-contained facet to the general discussion, we decided to dedicate special publications to them. The practitioners' essays assembled in this Working Paper highlight the problems they are facing when dealing with EC law, and thereby represent a very different perspective from the sometimes maybe too idealistic, enthusiastic visions of academic scholars.

To restate once again the general theoretical concerns that served as the *leitmotivs* in organising the conference: the process of European integration has produced a *sui generis* system of multi-level governance, which can neither be understood as a new super-state structure nor as a mere *Staatenverbund* (association of states).[3] We all know and experience that the so-called Europeanisation of Private Law does not occur comprehensively; instead, it affects private law only selectively (and) at different levels. European Directives regularly require changes at national level. These changes may be welcome innovations; yet, they will, by the same token, be perceived as interventions and thus exhibit 'disintegrative' effects. Even where a Directive reflected the consensus of all the Member States, it may, at a later stage and in an unforeseen way, exhibit such consequences. Not only do legislative projects within the European Union require activities at different levels; the European Judiciary is equally dispersed. No level and no branch of government or judiciary disposes of comprehensive powers, which is why simple recognition of the claims to supremacy of

[1] 'Special Issues on Interactive Private Law Adjudication in the European Multi-level System - Analytical Explorations and Normative Challenges', 8 (2000) ERPL, pp. v-x, and pp. 1-247.

[2] 'Evolutionary Perspectives and Projects on Harmonisation of Private Law in the EU', EUI Working Paper Law 99/7, S. Feiden and Chr. U. Schmid (eds), Florence, September 1999.

[3] *Cf.* out of an enormously rich literature, Fritz W. Scharpf, 'Governing in Europe. Effective and Democratic?', Oxford University Press, Oxford, 1999.

European law cannot ensure the coherence of the legal system in which we live. In a nutshell: legislative, as well as judicial, innovations at European level are not automatically compatible with the rest of Europe's legal system simply because the European Union does not harbour just one law.

There are important institutional implications to these observations: European legislative acts and, sometimes, the jurisprudence of the ECJ, are the cause of tensions; they cannot be their cure. The short-term and long-term effects of European interventions are only partly foreseeable and require productive and flexible reactions. This is why the responses to the problems that the Europeanisation process causes will depend upon the innovative potential of 'praxis' and the creativity of the judiciary. A second implication of the specifics of the European system needs to be stressed, namely its non-hierarchical network structure. The supremacy that European law and the ECJ can claim is, in principle, selective rather than comprehensive. This is why responses to complex issues cannot be expected from rulings originating from 'above' but must emerge from interactive processes within Europe's judiciary. Both European and national courts will have to understand their interdependence and define their roles. To rephrase the key-point again: the ECJ is *de facto* and *de jure* incapable to act as a super court of appeals in private law. It is subjected to a multiplicity of restrictions and has to adjust itself to these; the Europeanisation of Private Law must be supported by an interactively operating judiciary.

This is, obviously, a very demanding, highly idealistic long-term perspective. Our conference was meant as one manageable step forward in exploring the possibilities of the envisaged 'interactive adjudication'. Because of the crucial role assigned to the national judge as Community judge in the considerations outlined above, we were especially happy to welcome the judges from various important Italian and French courts, whose contributions are presented in this publication. They gave us very interesting insights into their work and the way European law presents itself to them in proceedings in front of a national court. And above all, they reminded us of the difficulties they are facing in their daily work, thereby bringing us down to earth. Namely, instead of entering into the discussion of the necessities and possibilities of interaction with judges both from other Member States *and* at EC-level, they seem to be more (and still) concerned with the problems of the anterior steps, i.e., having to deal with and integrate European law in national proceedings, and having to take into account the decisions and actions of EC Courts and bodies. Accordingly, their contributions consider the theoretical and technical questions that arise out of the co-existence of national and European law and of two different sets of actors on both levels.

The first three contributions deal with the inter-reaction of European and national law in the field of competition and antitrust law. In this collection's first contribution, *Marina Tavassi*, a judge from the *Corte d'Appello* of Milan, describes the task of national courts as Community courts. She talks about the consequences of a conflict between national and EC-law, and the way such a conflict is dealt with in the Italian judicial system. Since implemented or directly applicable EC-law has the status of ordinary (in contrast to constitutional) law, one of the important questions was how to organise the distribution of competencies between the civil courts and the constitutional court in deciding on the validity of national law that is contrary to EC law. Because of the different effect of the respective judgments - *erga omnes* in the case of findings of the constitutional court, but only between the parties in the case of civil courts - this question was of major relevance. In the field of competition law, the main questions arising under Articles 81 and 82 EC-Treaty were whether or not national competition law was applicable besides those provisions and how competencies between the EC courts and bodies on the one hand and their national counterparts on the other were to be assigned in order to avoid conflicting decisions on the same questions. In the Italian case the problem has been reduced by the adoption of the Italian Antitrust Law of 1990, which was formed after the European model and even provides for an interpretation on the basis of the principles underlying the European competition law. According to *Tavassi*, Italian judges have - contrary to what had been feared at first - proved to be very willing to refer to European precedents.

Claire Favre of the *Cour d'Appel* of Paris, who is dealing with the same topic from a French perspective, seems to be much more sceptic. According to her, the problem for the national judge is not so much applying European law, but becoming acquainted with the manifold and intricate rules – thus, a problem of access, information and knowledge. A French judge, she argues, is lost without a code. Despite of measures taken by the French government and administration in order to facilitate access to information, like establishing '*Magistrats*' at the appeal courts who are specialised in EC-Law and supposed to serve as a link to the European courts and the Commission, she still feels there is a deficit. This was true even in the field of competition law which is a privileged one in her view, since the Commission has proved to be very co-operative and procedures of consultation and co-operation have been established both by case law of the European courts and by statements of the Commission itself.

Massimo Scuffi, also from the *Corte d'Appello* of Milan, observes the development of antitrust law in Italy against the background of the EC Treaty. Referring to recent case law on

antitrust matters from Italian and European courts, he addresses a couple of new issues which are, in his view, not yet reflected sufficiently in the established rules and jurisprudence, and which require flexible and pragmatic responses. In order to react appropriately to new forms of market manipulation by different actors, he argues, the approach of antitrust law should not be formalistic. He deals for example with the question of non-profit organisations as possible offenders of antitrust law, or with 'conscious parallelism', coincidence of intents instead of concerted actions. Another topic he addresses by referring to examples from US practice is the problem of lobbying, i.e., the pursuit of economic interests through political pressure instead of economic conduct that would fall under antitrust law. Finally, he draws attention to the fact that antitrust law also has elements of consumer protection, since as the last link in the distribution chain the consumer suffers economic loss from forbidden antitrust practices because of higher prices or lesser quality. In this context, he addresses the question of representative action by consumer organisations which has been rendered possible only very recently in Italy, and the problem of identifying a sufficient causal link between the consumers' damages and the antitrust practices.

Giovanni Giacalone, judge at the *Corte di Cassazione* of Rome, deals with one of the most famous decisions of the ECJ and its consequences for national jurisprudence as well as the division of powers between European courts and the Member States' courts: the *Francovich* affair. He presents the reaction of the Italian legislator to this judgment, the way the Italian courts tried to fit both the new legislation and the *Francovich* decision itself into the Italian system of civil law and civil procedure, and the ECJ decisions that followed *Francovich* and gave the national courts some more guidance. The main issues addressed are the question of the right defendant, i.e., against whom compensation claims can be filed according to the *Francovich* jurisprudence, the qualification of the compensation within the Italian civil law system, which is relevant for the question of whether or not the compensation has to be re-evaluated and interests have to be paid, and the lawfulness of the time period within which claims can be made established by the Italian legislator. Since the ECJ is not willing to interfere with national concepts, it is up to the national judges to ensure that new concepts stemming from Community law fit into the traditional national system.

At the end of the collection we put a contribution that offers an insight to what is done at the European level to support the judges in their ambiguous role as national and Community organs: *Cosimo Monda* presents the CLAB database, a device developed by the European Commission to make the various decisions of European and national courts on questions of

unfair terms in consumer contracts more easily accessible - thereby trying to foster and promote interaction between 'European' and national jurisprudence.

This collection of contributions reflects various of the problems which the envisaged dialogue is facing. One of the most obvious is the plurilingualism:[4] it may be asking too much that national judges loaded with work and under immense time constraints should engage enthusiastically in reading their European colleagues' sentences in different languages on areas that have been influenced by European law. If it is true, as *Favre* claims, that they are already facing difficulties in getting acquainted with the European legislation and the jurisprudence of the ECJ, which are both available in their own languages, then they will certainly be even more reluctant to take this further step.

These obstacles to an interactive adjudication throughout Europe show that the judges will need help. Although it is certainly true that they play a crucial role - they are the Achilles' heel, as it has been put elsewhere -[5] they cannot be left alone with this task. A short term help might be provided by initiatives like the CLAB database; the more accessible the diverse decisions from the various European and national courts are, the more likely a national judge confronted with a 'European' problem will have a look into his colleagues' findings. However, in the long term perspective, it will be up to the European scientific legal community to educate lawyers who are used to looking outside of their home countries. Only then will national courts be able to fully accept their tasks as European courts and to contribute to the development of our new system of private law. There are a number of private initiatives which are moving into this direction.[6] There are other projects like that of *Silvana Sciarra* on the interaction of European and national courts in the field of labour law.[7] Finally, with the insertion of the aim of judicial co-operation into the EU Treaty by the Treaty of Amsterdam, an important impulse has been given on the institutional level.

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[4] *Cf* Marie-Jeanne Campana, 'Vers un language juridique commun en Europe?', 8 (2000) ERPL, p. 31-48 Nikolaus Urban, 'One Legal Language and the Maintenance of Culture and Linguistic Diversity?', *ibid.*, pp. 49-55.

[5] Kamiel Mortelmans, 'The Common Market, the Internal Market and the Single Market, what's in a Market', 35 (1998) CMLR 101 (at p. 126).

[6] *Cf* the first Working Paper in the framework of the Private Law Adjudication issue which was dealing with private initiatives that might support the courts (see *supra*, note 2).

[7] *Cf* Silvana Sciarra (ed.) ***Labour Law in the Courts: National Courts and the ECJ***, Hart Publishing, Oxford 2000.

It seems that we are on the right way. However, we have also realised that a lot remains to be done in view of the vision of interactive adjudication outlined above. Nevertheless, we are happy to present the contributions assembled in this Working Paper to the European legal public. We hope that they will find readers' interests, and we would appreciate any comments or critique.

We would like to thank Chris Engert for moderating the plurilingualism problem of a German speaking editors team by way of language checks and Professors Marie-Jeanne Campana and Christian Joerges for including this collection in the EUI Working Paper Series.

Florence, May 2000

Sonja Feiden and Kristina Riedl

DIRECT ENFORCEMENT OF THE COMMUNITY RULES BY THE COURTS OF THE MEMBER STATES

Relationship Between Community Law and the National System in the Competition Field

Marina Tavassi*

1 Introduction

Through the years, the decisions made by the ECJ or the Court of First Instance, as well as the indications of the Community institutions, have led the judges of the Member States to carry out their function as Community judges more intensely, by directly enforcing European Community law.

Reference to Community law is occurring more and more in civil proceedings, either by assimilating the national law into that of the Community (for example, Italian laws that adjust the system to Community law are enacted periodically by the implementation of the '*La Pergola*' Law of 9 March 1989),[1] or by direct enforcement of the Community rules. The source of the direct effect of Community law in the Member States is found in Article 249 (ex Article 189) EC, which asserts that regulations and directives are mandatory and directly applicable in every Member State, with the exception of the competence of national institutions concerning forms and ways of implementation.

The first indications of the direct implementation of Community law by national judges are derived from decisions of the ECJ (leading cases *Van Gend & Loos* and *Costa v ENEL*).[2] The above-elaborated principles were corroborated by the *Simmenthal* case,[3] which asserts that Community rules are an immediate source of rights and duties, either for the States or for individuals; this indication concerns national judges, too, because they are organs of a

* Judge at the Court of Appeal of Milan.

[1] Act No 86 of 9 March 1989 '*La Pergola*', published in Gazz.Uff. No 58/1989 of 10 March 1989.

[2] ECJ, Case 26/62 of 5 February 1963, *N.V. Algemene Transport- en Expeditie Onderneming Van Gend & Loos v Dutch Tax Administration*, ECR 1963, p. 3; Case 6/64 of 3 June 1964, *Flaminio Costa v ENEL*, ECR 1964, p. 1194; and in the same terms see, joined Cases 90-91/63 of 13 November 1964, *Commission v Luxembourg and Belgium*, ECR 1964, p. 1217.

[3] ECJ, Case 106/77 of 9 March 1978, *Minister of Finance v Simmenthal*, ECR 1976, p. 1871.

Member State and must, therefore, protect the rights conferred to everybody by Community law.

2 Community law and the Italian legal system

In the Italian legal system, the problem of the relationship between Community law and national legislation has turned out to be particularly complicated and has been solved through the subsequent interventions of the Constitutional Court.

First, it is important to note that the gradual enforcement of the Treaties establishing the European Communities has been given by ordinary laws; thus, Community rules assimilated into our system took the position of ordinary laws.

At the beginning, the Italian Constitutional Court took a position of disapproval with regards to the suggestions made by the ECJ in the cases *Costa v ENEL* and *Simmenthal*, which have been illustrated above. In these Decisions, the Italian Constitutional Court considered Community law as being included into the legal system in the same way as national rules, referring to the chronological principle in order to solve the conflict between subsequent national laws and Community regulations which were incompatible with national laws. The orientation of this first line of decisions has prejudiced the direct applicability of a Community law, contrasting it with a national law when the last national law is subsequent to it.

In the so-called 'second period', we can note that the national legal system and the Community one are 'distinct and autonomous legal systems'. The relationship between them is ruled by judges who just base their decisions on simply following the laws at the time, but check the national law's conformity to Community law; and this check is performed by the Constitutional Court, when the national law is subsequent to that of the Community. In contrast, the check is given to the judge when the national law precedes the Community law; consequently, it is overruled by the latter.[4]

[4] See Italian Constitutional Court, Case 183 in Foro it., 1974, I, 314 of 27 December 1973, with note of Monaco, 'La costituzionalità dei regolamenti comunitari'; and in Giur.cost., 1973, 2401, with note of Barile, 'Il cammino comunitario della Corte'. See, also, Italian Constitutional Court, Case 232 in Foro it., 1975, I, 2661 of 30 October 1975, with note of Monaco, 'Norma comunitaria e norma di legge successiva'; and *ibid*, 1976, I, 542 with note of Conforti, 'Regolamenti comunitari, leggi nazionali e Corte Costituzionale' (also published in Giur.cost., 1975, I, 232, with note of Sorrentino, 'Brevi osservazioni sulle leggi contrastanti con le norme comunitarie: incostituzionalità e/o disapplicazione', *ibid*, 1975, I, 3239).

In the 'third period', the Constitutional Court asserts the duty of the judge not to apply national law that clashes with directly applicable Community laws, with the exclusion of the admissibility of questions which concern the violation of Article 11 of the Constitution of the Republic of Italy.[5] The Italian Constitutional Court is competent only in cases of national rule, which does not contradict Community law and thus does not seem to be 'not applicable', but this, in turn, prevents the observance of the fundamental principles of the EC Treaty.[6]

In recent times, we have spoken about a 'fourth period' of decisions of the Italian Constitutional Court with Decision No 384 of 1994 and Decision No 94 of 1995.[7] In these Decisions, and especially in the second one, the Court specifies that it is up to every single judge not to apply a national law that clashes with a Community law, while the Constitutional Court has the competence to judge questions of the unconstitutionality of State laws which contrast with a Community law when they are raised. Every time we want the conflict between the national law and Community law to be recognised, with validity *erga omnes*, we will have to submit the case to the Constitutional Court, because the 'disapplication' (the denial of enforcement) of a law by a judge, with regard to the controversy presented to him, will be effective only to the parties of the case.

3 Concurrence or reciprocal exclusion between Community law and national law with regard to competition

The subject of competition offers an important example of the regulation of the problem of relationships between Community law and the national legal system; in some uncertain

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[5] Article 11 of the Italian Constitution declares: "*L'Italia ripudia la guerra come strumento di offesa alla libertà degli altri popoli e come mezzo di risoluzione delle controversie internazionali; consente, in condizioni di parità con gli altri Stati, alle limitazioni di sovranità necessarie ad un ordinamento che assicuri la pace e la giustizia fra le Nazioni; promuove e favorisce le organizzazioni internazionali rivolte a tale scopo.*" ("*Italy rejects war as an instrument of aggression against the freedoms of other peoples and as a means for settling international controversies; it agrees, on conditions of equality with other states, to the limitations of sovereignty necessary for an order that ensures peace and justice among Nations; it promotes and encourages international organisations having such ends in view.*").

Cf Italian Constitutional Court, Case 170, in Foro it., 1984, I, 2062, of 8 June 1984, with note of Tizziano, 'La Corte Costituzionale e il diritto comunitario: vent'anni dopo...'. See Berri, 'Composizione del contrasto fra Corte Costituzionale e Corte di Giustizia delle Comunità Europee', Giur.it., 1984, I, 1521; Capelli, 'Una sentenza decisiva sui rapporti fra norme CEE e leggi nazionali', (1984) Dir.com.sc.int., 204.

[6] That was the orientation of the Italian Constitutional Court's Ordinance 141, in Giur.cost., 1987, I, 964, of 16 April 1987; and Decision 286, in Foro it., 1987, I, 1010 of 23 December 1986; see also, Italian Constitutional Court, Decisions 47 and 48, of 22 February 1985, in Giur.cost. 1985, I, 215; Ordinance 29, of 3 February 1986, *ibid*; Decision 274, of 19 December 1986, *ibid*, 1986, I, 2253; Decision 115, of 26 March 1993, *ibid*, 1993, 983.

[7] Following, in the same terms, Italian Constitutional Court, Decisions No 249 of 16 June 1995; No 482 of 7 November 1995; and No 520 of 28 December 1995.

situations, it remains in doubt whether or not the case at hand should be submitted to Community law or to national law, or if they are both applicable.

We have to distinguish the above-mentioned problem from that which concerns the question of whether the enforcement of Community law is up to the national judge or up to the Commission and the Community judges; this argument will be discussed later.

First, we can observe that Article 81 and Article 82 (ex Articles 85, 86) EC are applicable only in case where it is possible to recognise a prejudice to commercial activity among the Member States, while the applicability of Article 65 and 66 CS is total and does not leave any space open to the question of intervention by the Member States.[8]

Regarding the specific problem of the relationship between Community law and national law concerning the subject of competition, the solution is different according to the discipline of collusion or to the issue of mergers. The ruling of Article 21 of Merger Regulation[9] deals with the competence between ECJ and Commission; the 2nd paragraph categorically asserts that "*Member States do not apply their national law on competition to mergers which cover Community market*", thus excluding the possibility of a 'double control'. It is important to note that Community mergers are identified by referring to parameters based on the turnover of the enterprises involved.

In contrast, with regard to collusion, Community law finds application only in cases when it is possible to see a market prejudice among the Member States. As consequence of this, if collusion takes place only in a single State and does not restrict competition, it will be submitted only to national law; if not, it is submitted to European law. We wonder whether, in the a case of collusion which restricts competition among States, it is possible to use national law in addition to Community law for what concerns the more relevant national aspects, in respect of the supremacy of Community law over national law. To face this problem we have formulated two solutions: the first one is called 'one way control theory' or 'reciprocal exclusion' and the second one is called 'double control theory' or 'concurrence'. The former is founded on the conviction of the supremacy of Community law: all national issues finish

[8] See Mattheis, in Quadri / Monaco / Trabucchi (eds.), *Commentario CECA*, vol. II, Milano, 1970, pp. 923 ff.

[9] Council Regulation 4064/89/EEC of 21 December 1989, on the control of concentrations between undertakings (OJ 1989 L 395/89/p. 1 of 30 December 1989); recently amended by Council Regulation 1310/97/EC of 30 June 1997 (OJ 1997 L 180/97/p. 1 of 9 July 1997), in order to lower the shares from 1 March 1998 on.

Art. 7 (Relazione annuale al Parlamento): 1.) Entro il 31 gennaio di ogni anno il Ministro competente per le politiche comunitarie presenta al Parlamento una relazione sui seguenti temi: a) gli sviluppi del processo di integrazione europea, con particolare riferimento alle attività del Consiglio dell'Unione europea, alle questioni istituzionali, alle relazioni esterne dell'Unione europea, alla cooperazione nei settori della giustizia e degli affari interni ed agli orientamenti generali delle politiche dell'Unione; b) la partecipazione dell'Italia al processo normativo comunitario con l'esposizione dei princìpi e delle linee caratterizzanti della politica italiana nei lavori preparatori all'emanazione degli atti normativi comunitari e, in particolare, degli indirizzi del Governo su ciascuna politica comunitaria, sui gruppi di atti normativi riguardanti la stessa materia e su singoli atti normativi che rivestono rilievo di politica generale; c) l'attuazione in Italia delle politiche di coesione economica e sociale e l'andamento dei flussi finanziari verso l'Italia e la loro utilizzazione, con riferimento anche alle relazioni della Corte dei conti delle Comunità europee per ciò che concerne l'Italia. 2.) Nella relazione di cui al comma 1 sono chiaramente distinti i resoconti delle attività svolte e gli orientamenti che il Governo intende assumere per l'anno in corso.

Art. 8 (Integrazione della relazione di cui all'art. 2, secondo comma, della legge 13 luglio 1965, n. 871): abolito

Art. 9 (Competenze delle regioni e delle province autonome): 1.) Le regioni a statuto speciale e le province autonome di Trento e di Bolzano, nelle materie di competenza esclusiva, possono dare immediata attuazione alle direttive comunitarie. 2.) Le regioni, anche a statuto ordinario, e le province autonome di Trento e di Bolzano, nelle materie di competenza concorrente, possono dare immediata attuazione alle direttive comunitarie. 3.) (2'.) Le leggi regionali e provinciali di cui ai commi 1 e 2 recano nel titolo il numero identificativo di ogni direttiva attuata. Il numero e gli estremi di pubblicazione di ciascuna legge sono comunicati alla Presidenza del Consiglio dei ministri - Dipartimento per il coordinamento delle politiche comunitarie. 4.) La legge comunitaria o altra legge dello Stato che dia attuazione a direttive in materia di competenza regionale indica quali disposizioni di principio non sono derogabili dalla legge regionale sopravvenuta e prevalgono sulle contrarie disposizioni eventualmente già emanate dagli organi regionali. Nelle materie di competenza esclusiva, le regioni a statuto speciale e le province autonome si adeguano alla legge dello Stato nei limiti della Costituzione e dei rispettivi statuti. 5.) In mancanza degli atti normativi della Regione, previsti nei commi 1, 2 e 3, si applicano tutte le disposizioni dettate per l'adempimento degli obblighi comunitari dalla legge dello Stato ovvero dal regolamento di cui all'articolo 4. 6.) La funzione di indirizzo e coordinamento delle attività amministrative delle regioni, nelle materie cui hanno riguardo le direttive, attiene ad esigenze di carattere unitario, anche in riferimento agli obiettivi della programmazione economica ed agli impegni derivanti dagli obblighi internazionali. 7.) Fuori dei casi in cui sia esercitata con legge o con atto avente forza di legge nei modi indicati dal comma 3 o, sulla base della legge comunitaria, con il regolamento preveduto dall'articolo 4, la funzione di indirizzo e coordinamento di cui al comma 5 è esercitata mediante deliberazione del Consiglio dei Ministri, su proposta del Presidente del Consiglio dei Ministri, o del Ministro per il coordinamento delle politiche comunitarie, d'intesa con i Ministri competenti.

Art. 10 (Sessione comunitaria della Conferenza Stato-regioni): 1.) Il Presidente del Consiglio dei ministri convoca almeno ogni sei mesi o anche su richiesta delle regioni e delle province autonome di Trento e di Bolzano una sessione speciale della Conferenza permanente per i rapporti tra lo Stato, le regioni e le province autonome di Trento e di Bolzano, dedicata alla trattazione degli aspetti delle politiche comunitarie di interesse regionale e provinciale. Il Governo informa le Camere sui risultati emersi da tale sessione. 2.) La Conferenza, in particolare, esprime parere: a) sugli indirizzi generali relativi all'elaborazione ed attuazione degli atti comunitari che riguardano le competenze regionali; b) sui criteri e le modalità per conformare l'esercizio delle funzioni regionali all'osservanza e all'adempimento degli obblighi di cui all'articolo 1, comma 1; (b'.) sullo schema del disegno di legge di cui all'articolo 2. 3.) Il Ministro per il coordinamento delle politiche comunitarie riferisce al Comitato interministeriale per la programmazione economica (CIPE) per gli aspetti di competenza di cui all'articolo 2 della legge 16 aprile 1987, n. 183.

Art. 11 (Inadempimenti delle regioni e province autonome): 1.) Se l'inadempimento di uno degli obblighi previsti dall'articolo 1, comma 1, dipende da inattività amministrativa di una regione o di una provincia autonoma, il Ministro per il coordinamento delle politiche comunitarie, d'intesa con il Ministro per gli affari regionali ed i Ministri competenti, avvia la procedura prevista dall'articolo 6, terzo comma, del D.P.R. 24 luglio 1977, n. 616. 2.) Il Consiglio dei Ministri, con la deliberazione prevista dall'articolo 6, terzo comma, del D.P.R. 24 luglio 1977, n. 616, successivamente alla scadenza del termine assegnato alla regione o alla provincia autonoma interessata per provvedere, dispone, con le modalità di cui all'articolo 6, comma 3, della presente legge, l'intervento sostitutivo dello Stato; a tal fine può conferire, con le opportune direttive, i poteri necessari ad una commissione da nominarsi con decreto del Presidente del Consiglio dei Ministri, su proposta del Ministro per gli affari regionali, sentito il

Ministro per il coordinamento delle politiche comunitarie. 3.) La commissione di cui al comma 2 è composta: a) dal commissario del Governo, che la presiede; b) da un magistrato amministrativo o da un avvocato dello Stato o da un professore universitario di ruolo di materie giuridiche; c) da un terzo membro designato dalla regione o provincia autonoma interessata o, in mancanza di tale designazione entro trenta giorni dalla richiesta, dal presidente del tribunale avente sede nel capoluogo della regione o della provincia, il quale provvede con riferimento alle categorie di cui alla lettera b.4.) Le funzioni di segreteria della commissione sono svolte da personale del commissariato di Governo.

Art. 12 (Inadempimenti degli enti pubblici): 1.) Se l'inadempimento di uno degli obblighi previsti dall'articolo 1, comma 1, dipende da inattività di un ente pubblico diverso dallo Stato, da una regione o da una provincia autonoma, il Presidente del Consiglio dei Ministri, su proposta del Ministro per il coordinamento delle politiche comunitarie, di concerto con i Ministri competenti per materia ed acquisite le osservazioni dall'ente interessato, emana le direttive necessarie, assegnando all'ente medesimo un termine per provvedere. 2.) Perdurando l'inattività oltre il termine predetto, il Presidente del Consiglio dei Ministri conferisce ad un commissario i poteri per provvedere in sostituzione degli organi dell'ente.

Art. 13 (Iniziative per la coesione europea ed il mercato interno): 1.) Il Ministro per il coordinamento delle politiche comunitarie promuove, d'intesa con il Ministro degli affari esteri e gli altri Ministri competenti, le iniziative volte alla coesione socio-economica europea, anche mediante azioni concertate con la Comunità economica europea e gli altri Stati membri. 2.) Il Dipartimento costituito dall'articolo 1 della legge 16 aprile 1987, n. 183, nell'ambito delle sue funzioni di coordinamento delle politiche comunitarie relativamente al mercato interno, assicura, con i mezzi più opportuni, la più ampia diffusione delle notizie relative ai provvedimenti di adeguamento dell'ordinamento interno all'ordinamento comunitario che conferiscono diritti ai cittadini della Comunità, o ne agevolano l'esercizio, in materia di libera circolazione delle persone e dei servizi.

Art. 14 (Integrazioni alla legge 11 dicembre 1984, n. 839): (la norma aggiunge un comma all'art. 7)

Art. 15 (Disposizioni finali): Sono abrogati gli articoli 12 e 13 della legge 16 aprile 1987, n. 183, nonché ogni altra norma incompatibile con le disposizioni della presente legge.

5 French Civil Code (Code Civil, Titre IV: De la responsabilité des produits défectueux)

Art. 1386-1: Le producteur est responsable du dommage causé par un défaut de son produit, qu'il soit ou non lié par un contrat avec la victime.

Art. 1386-2: Les dispositions du présent titre s'appliquent à la réparation du dommage qui résulte d'une atteinte à la personne ou à un bien autre que le produit défectueux lui-même.

Art. 1386-3: Est un produit tout bien meuble, même s'il est incorporé dans un immeuble, y compris les produits du sol, de l'élevage, de la chasse et de la pêche. L'électricité est considérée comme un produit.

Art. 1386-4: Un produit est défectueux au sens du présent titre lorsqu'il n'offre pas la sécurité à laquelle on peut légitimement s'attendre. Dans l'appréciation de la sécurité à laquelle on peut légitimement s'attendre, il doit être tenu compte de toutes les circonstances et notamment de la présentation du produit, de l'usage qui peut en être raisonnablement attendu et du moment de sa mise en circulation. Un produit ne peut être considéré comme défectueux par le seul fait qu'un autre, plus perfectionné, a été mis postérieurement en circulation.

Art. 1386-5: Un produit est mis en circulation lorsque le producteur s'en est dessaisi volontairement. Un produit ne fait l'objet que d'une seule mise en circulation.

Art. 1386-6: Est producteur, lorsqu'il agit à titre professionnel, le fabricant d'un produit fini, le producteur d'une matière première, le fabricant d'une partie composante. Est assimilée à un producteur pour l'application du présent titre toute personne agissant à titre professionnel: 1) Qui se présente comme producteur en apposant sur le produit son nom, sa marque ou un autre signe distinctif; 2) Qui importe un produit dans la Communauté européenne en vue d'une vente, d'une location, avec ou sans promesse de vente, ou de toute autre forme de distribution. Ne sont pas

principle of subsidiarity stated by the EU Treaty (Article 3B introduced by the Maastricht Treaty of 7 February 1992; now Article 5 EC).

5 Relationships between Community law and national law in the matter of competition

The subject of competition provides an example of regulation of the relationships between national judges and Community authorities, in the enforcement of national and Community laws; this also gives indications effective in other sectors.

By this decision,[19] the ECJ has developed a range of guidelines, which have been received by a the Notice of the Commission of 13 February 1993. These guidelines can be considered by national judges to avoid the issue of decisions which are not compatible with those established by the Commission. With regard to the enforcement of Articles 81 and 82 EC by national judges, it is possible that the same question has already been submitted or will be submitted to the Commission, and thus it is very important not to make decisions which conflict with former decisions. A first hypothesis is given when the Commission has already dealt with the collusion or the case: here, the national judge is not bound to the Commission's acts, but can draw relevant elements from it for his decision, thus avoiding a decision which clashes.

A different situation is the existence of the conditions for individual exemptions and exemption per category, in accordance with Article 81 (3) (ex Article 85 (3)) EC. On this subject, the Commission has an exclusive competence, so the national judge has to adhere to the Commission's decision. In the case when the Commission sends a 'comfort letter',[20] the Court has asserted that this kind of letter does not bind national judges, even though *"the*

Chiti, 'Misure cautelari positive e effettività del diritto comunitario', and in (1996) Riv.dir.pubbl.com. 1156, with note of Masucci, 'La lunga marcia della Corte di Lussemburgo verso una tutela cautelare europea'. *Cf*, also, ECJ, Case C-236/95 of 19 September 1996, *Commission v Greece*, ECR 1996, p. I-4459; in Giur.it. 1998, I, 145; Tavassi, *Antitrust between EC Law and National Law, The interim measures of the Court of Justice and Tribunal of First Instance*, Milan, 1993.

[19] *Cf* the above-mentioned Decisions of *Delimitis, Brasserie Haecht, BRT v Sabam.* Regarding competition and infringement of Article 85 EC, it is interesting to remember the more recent Decision of the EJC, Case C-219/95, of 17 July 1997, *Ferrovie Nord v Commission*, ECR 1997, p. I-4411.

[20] Sent in accordance with Article 6 of Council Regulation 99/63/EEC of 25 July 1963, on the hearings provided for in Article 19 (1) and (2) of Council Regulation 17 (OJ 1963/64/p. 47 of 20 August 1963). For better knowledge of these letters, *cf* Court of First Instance, the above-mentioned Decision *Casper Koelman* (supra, note 12), and Decisions T-7/92, of 29 June 1993, ECR 1993, p. II-669; and T-387/96 of 18 September 1996, ECR 1996, p. II-961, both *Asia Motor France SA ed al v Commission*; and Case T-471/93, of 18 September 1995, *Tiercé Ladbroke S.A. v Commission*, ECR 1995, p. II-2537.

evaluation of the Commission is an important element which judges may consider in examining the conformity of the submitted agreements and behaviour to Article 85".[21]

In all these situations, the Commission has not yet made a decision on the matter of the collusion or the case under the examination of the national judge, who, enforcing Articles 81 and 82 EC, can refer to the line of decisions made by the ECJ and the Court of First Instance, as well as the general notices published by the Commission, which indicates all agreements that are not included in the prohibition contained in Article 81 (1) EC.

There is another case in which the question submitted to the national judge is already an object of a procedure before the Commission; in this case, if it is a necessary way to assure the certainty of law, or if he wants to avoid a decision that clashes, the national judge may defer the judgment so as to wait for the result of the Commission activity. The hypothesis of direct transfer of action to the ECJ in accordance with Article 234 (ex Article 177) EC is quiet different. This rule allows, in a relatively short time, both the interpretative judgment by the ECJ and the Commission's observations during the deposit of observations contained in Article 20 of the Protocol on Statute of the ECJ.

With references to my proceeding point concerning Regulation 17/62, we can deduce that, in addition to national judges, direct enforcement of Articles 81 and 82 EC is the responsibility of the national authority. This power, with regard to Community law, comes from a series of decisions of the ECJ[22] and from Commission Notice of 15 October 1997.[23] With regard to the Italian legal system adjustment, it comes from the line of decisions of the Italian Constitutional Court[24] and the Law "*Legge Comunitara* 1994" (i.e., the 5th enforcement of the '*La Pergola*' Law).[25] Article 54 of this Law assigned a specific

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[21] So the mentioned Notice of 13 February 1993, at paragraph 20 (see *supra*, note 15), and the quoted Decisions of the ECJ of 10 July 1980, in Cases *Profumi* (Case 99/79, *Lancôme*, and Case 253/78, *Guerlain*, point 11) (see supra, note 12), in addition to ECJ, Case 31/80 of 2 December 1980, *L'Oréal*, ECR 1980, p. 3775.

[22] *Cf* Case *Bosch* (see *supra*, note 14); Case *Van Gend & Loos* (see *supra*, note 2); Case *Costa v ENEL* (*supra* note 2); Case *Simmenthal* (see *supra*, note 3); Case 103/88, of 22 June 1989, *Fratelli Costanzo s.p.a. v Comune di Milano*, ECR 1989, p. 1839.

[23] Commission notice on co-operation between national competition authorities and the Commission in handing cases falling within the scope of Articles 85 or 86 of the EC Treaty (OJ 1997 C 313/1997/p. 3-11, of 15 October 1997).

[24] *Cf* Italian Constitutional Court, Decision 328/89, of 4-11 July 1989, in Giur.it. 1991, 524; with note of Capelli, 'In tema di adeguamento della legislazione interna alla normativa comunitaria', (1989) Corr.giur. 1058. The European Commission has decided in this way since the First Report of 1958.

[25] (Italian) Act 52 of 6 February 1996, '*Legge Comunitaria 1994 - Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia alle Comunità Europee*', published in Gazz.Uff. No 34/1996 S.O. of 10 February 1996; see, for a commentary, Di Pietro, 'Prime considerazioni sulle nuove competenze dell'antitrust nazionale attribuite dalla legge comuitaria per il 1994', (1996) Riv.it.dir.pubbl.com. 496.

competence to the national competition authority, aimed at conferring a better implementation to the decentralisation in the application of Articles 81 (1) and 82 EC.

The principles elaborated by the series of decisions made by Community Institutions have constituted the ground upon which the above-mentioned Notice of 15 October 1997, which refers to the co-operation between the Commission a the national competition authorities of the Member States is founded. The Notice aims at clarifying the different roles played in competition policy by both the European Community and the Member States (point 1), and specifies that, while the Commission is competent only for the enforcement of Community law, the national authorities, besides dealing with the enforcement of national law, also take part in the implementation of Articles 81 and 82 EC, and that this is done with the intention of a better distribution of tasks and of adopting decisions at a level which is closer to the citizen. Another duty of national judges, acting in conformity to the principles elaborated by the decisions of the ECJ and the Court of First Instance, is the protection of the subjective rights of the individual in the relationships between them (point 3), while, in the case of the Commission and national competition authorities, they must both act in the public interest (point 4). An important principle is to assert that all national authorities can enforce Articles 81 and 82 EC "*in combination with their national law in the area of competition*", but the implementation of the latter must be in conformity with the univocal enforcement, in the Common Market, of the Community laws.[26]

In every paragraph of the considered Notice, it is evident that the aim is to make a network between the Commission and the national authorities within which they can co-operate closely with each other.

6 The Italian Antitrust Law (Act No 287 of 1990)[27]

Italy was one of the last countries in Europe to adopt a specific competition law. This law is contained in Act No 287 of 10 October 1990 "*Norme per la tutela della concorrenza e del mercato*" ("Rules for the protection of competition and the market", i.e., Antitrust Law). It aims, by fostering a higher degree and starting from the same resources, at promoting social welfare, by protecting not only the freedom of enterprises but also the rights of consumers. The Antitrust Law is not governed solely by considerations of the efficiency of the economic system; it places these considerations within the context of public intervention in the

[26] ECJ, Case 14/68, of 13 February 1969, *Wilhelm v Bundeskartellamt*, ECR 1969, p. 1.

economic sphere. The Italian legislator has chosen to divide the responsibility for dealing with competition matters between the judicial courts and the competition authority, which is responsible for safeguarding both competition and the market. Given this division of responsibilities, the judges are inevitably and principally responsible for dealing with litigation between enterprises, while the competition authority performs a role of supervision, consultation and protection of the general interest and economic equilibrium.

The Antitrust Law was enacted in a context that was already regulated: the judges had a clearly defined role in competition matters by virtue of the experience they had acquired in dealing with competition disputes, though most of them had to deal with disputes between firms, but their role was not to protect the general interest or the consumer interest (although obviously these were never ignored in court rulings). It should be noted that, in the Italian judicial system, the ordinary judge is only competent to rule on subjective rights, and that his role is limited to disputes between private persons endowed with private rights.

Even before the enactment of the Antitrust Law, the competition provisions of the EC Treaty (Article 81 EC on agreements, Article 82 EC on the abuse of dominant position) were enforced by Italian courts, together with domestic legal provisions governing competition such as Articles 2598 ff. of the Italian Civil Code, which are concerned with unfair competitive behaviour and Article 2597 of the Italian Civil Code which relates to enterprises in a monopolising position. Even after the enactment of the Italian Antitrust Law, which gave the Court of Appeal sole competence, in the first and last instance, in relation to nullity actions and claims for damages (Article 33 (2) Antitrust Law), the following categories of disputes continued to be dealt with by the courts in accordance with ordinary law and established practice prior to the entry into force of the Antitrust Law:

a) disputes involving breaches of antitrust legislation other than nullity suits and claims for damages;

b) disputes arising from infringements of competition rules of the EC Treaty (Articles 65 and 66 CS; 81 and 82 EC) and breaches in rules of third countries, where it is for the Italian courts to know these rules and to enforce them;

c) disputes arising from the provisions of the Civil Code and Article 2598 in particular.

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[27] See *supra*, note 11.

Sometimes, an infringement may be punishable in several different courts, so that a dispute may give rise to several legal actions. Several bodies may, therefore, be competent to rule in a given case, each competent to propose its own remedy. There is thus a risk of conflicting rulings, but it can be avoided to some extent by using the means provided by the system; for example, proceeding may be promptly suspended, though this solution is not always possible.

The lawgiver of the Antitrust Law has assigned to this law a role we can define as residual, because it can only be enforced in cases that go beyond the provisions foreseen by Community law (Article 1 (1) Antitrust Law). However, the Italian Antitrust Law has assimilated the suggestions drawn from the decisions of the ECJ and the Court of First Instance, and seems to reflect the principles elaborated by the Notices of the Commission that we have already taken into consideration. Regarding this subject, it is important to note that in accordance with the first paragraph of Article 1 Antitrust Law, the enforcement of the Antitrust Law is limited to agreements in restraint competition, abuses of dominant position and mergers, which are not subject to Articles 81 and 82 EC.

The competition authority and national judges have a double responsibility: the implementation of national antitrust rules, according to the powers which have been conferred to them by the Antitrust Law itself, and the direct implementation of Articles 81 and 82 EC, in accordance with the suggestions and limits contained in the above-mentioned Notices.[28] In fact, we have to consider that the third paragraph of Article 1 Antitrust Law forces the competition authority to suspend its own proceedings when a procedure has already been started by the Commission; this is also suggested in the Notice dated 15 October 1997.

We can conclude that the national authority is allowed to deal with cases whose effects are essentially relevant on national territory (even by demand or notice received by the Commission), while, in cases that have European importance, the national authority has to inform the Commission about them, even if it can deal with 'possible aspects of national relevance'.

Yet, what is the role of the courts? Under the Italian Antitrust Law, the role of the judge is to remedy the previous shortcomings of domestic legislation while enforcing Community law,

[28] See, for national law, Siragusa / Scassellati / Sforzini, (op cit note 12) at p. 249; Benedettelli, (op cit note 14) at p. 235; Merola / Rizzo / Bojardo, 'Tutela della concorrenza nella legge 287 del 1990: rapporti con l'ordinamento comunitario', Giur.it., 1991, IV, 520; Bernini, *Un secolo di filosofia antitrust. Il modello statunitense, la disciplina comunitaria e la normativa italiana*, Bologna, 1991; Raffaelli, 'I giudici nazionali ed il diritto comunitario della concorrenza', II (1994) Riv.dir.civ. 1; Tavassi, 1996 (op cit note 18); Tavassi / Scuffi, *Diritto processuale antitrust*, Milano, 1998.

and to deal with those areas, admittedly very restricted, assigned to the judges by the Act. According to the Act, the role of the ordinary judge (the Court of Appeal having jurisdiction in accordance with Article 33 Antitrust Law) is to back up and complement the powers assigned to the competition authority, and to the Regional Administrative Court of Lazio for appeals against decisions by the authority. In addition, the Court of Appeal has sole jurisdiction to rule on urgent and protective measures which have been taken. In fact, the second paragraph of Article 33 Antitrust Law also gives to the Court of Appeal the jurisdiction to rule "*on appeals lodged with a view to obtaining the application of urgent measures in respect of infringements of the provisions of the law*".

In addition, protective measures can be requested to the tribunal (the Italian Court of First Instance) on the basis of standard rules, provided they are not requested in connection with nullity suits or damage claims in accordance with Article 33 Antitrust Law. In contrast, the competition authority has no specific powers to take protective or urgent measures, but it has wide powers to impose penalties, the effects of which can be immediate on the behaviour that is under investigation.

It may be noted that, despite the first rulings made by the Court of Appeal of Milan,[29] together with the later rulings made by the Court of Appeal of Rome and other Italian courts,[30] it has been stated that the Court of Appeal's competence to issue emergency measures is limited to the suits of nullity and claims for damage.

It is important to see how courts refine legal criteria when enforcing competition laws. The Italian Antitrust Law provides a special instrument for interpreting its rules that draws on the principles of EC legislation in respect to competition law. Article 1 (4) Antitrust Law stipulates: "*The provision contained herein shall be interpreted on the basis of the judicial principles underlying the European Communities' regulation of competition*". Nothing of the sort is to be found in the judicial system of other European States, even though the authorities responsible for the enforcement of competition law have spontaneously and promptly provided an interpretation coherent with Community principles.

It was feared that the Italian Courts would not take favourably to this limitation, but such was not the case. In fact, a large number of rulings, at both a preliminary and substantive

[29] Court of Appeal of Milan, Orders of 23 January 1992, *Cavirivest v Nuova Samim*; 15 July 1992, *AVIR v ENEL*; 5 February 1992, *MYC et al v AFI et al*; and then Order of 21 March 1995, *B.B. Center v Parabella*.

[30] Court of Appeal of Rome, Orders of 20 January 1993, *Gruppo Sicurezza v Aeroporti di Roma*; of 20 August 1993, *CMS v ENEL*; of 21 December 1993, *De Montis v Aeroporti di Roma*; Court of Appeal of Genova, Decision of 14 October 1996, *Le Sorelle di Fiorella Arcodia & C. v Parabella*.

level, drew not only upon the principles contained in Articles 1-8 of the Treaty of Rome and the fundamental principles relating to competition (e.g., the guarantee that competition not be distorted, unity of the integrated market), but also to factors arising from the cases of the ECJ and the Court of First Instance, and even from the Commission. This is why - in analysing horizontal and vertical agreements or tacit collusion and collusive practices, defining relevant markets, substantiating the existence of a dominant position and of the abuse thereof, and choosing criteria for assessing concentrations or exemptions - Italian judges have constantly referred both to cases submitted to Community bodies for review and to principles laid down in the various rulings which are cited explicitly in many of their competition-related orders and rulings.

Accordingly, in defining the concept of 'relevant market', the criteria defined by Community cases in terms of 'products market' and 'geographical market' were adopted, whereas to substantiate a dominant position reference is made to elements such as market share, number of competitors, a firm's technological superiority, the refinement of its own organisation, the firm's dynamic prospects and the persistence of its position. It was precisely the approach that the Court of Appeal of Milan has expressed in the case *Scamm v FAI Komatsu Industries*,[31] when it examined a case of abuse of a dominant position deduced from discriminatory pricing practices. Citing the decisions of the ECJ and the precedents examined by the Commission in respect of application of Article 82 (ex Article 86) EC, the Milan Court deemed that the dominant position ought to be examined in the light of the so-called 'structural' criteria, these being represented, first, by the share of the relevant market and of each of the 'segments' examined, both in absolute value, which takes turnover into account, and as a percentage share of the competition and the number of parties present in the sector under examination (see Cases *United Brands*, *Hoffmann*, *PB Industries*, *Michelin*).[32] The principle expressed in the aforementioned *Hoffmann v La Roche* Decree was implemented in the following terms: "*The dominant position referred to in Article 86 corresponds to a situation of economic power whereby the business holding such power is able to hinder the persistence of effective competition in the market in question, and to a firm's ability to behave in a fairly independent manner vis-à-vis its competitors, its customers and, in the final*

[31] Court of Appeal of Milan, Order of 10 January 1996.

[32] ECJ, Case 27/76 of 14 February 1978, *United Brands*, ECR 1978, p. 207; ECJ, Case 102/77 of 13 February 1979, *Hoffmann-La Roche v Commission* (*Vitamins* Case), ECR 1978, p. 1139; Commission Decision 89/22/EEC of 5 December 1988, relating to a proceeding under Article 86 of the EEC Treaty (Case IV/31.900 *BPB Industries plc*, OJ 1989 L 10/1989/p. 50 of 13 January 1998); Commission Decision 81/969/EEC of 7 October 1981, Case *Michelin* (OJ 1981 L 353/1981/p. 33 of 9 December 1981); and ECJ's Order of 9 November 1983, Case 322/81, *Michelin v Commission*, ECR 1983, p. 3461.

analysis, consumers".[33] Similarly, to define the concept of an enterprise, the Court of Appeal of Milan, in the *Comis v Ente Fiera* Case,[34] deemed that it could transcend purely judicial guidelines (Article 2195 of the Italian Civil Code) and refer to economic and market organisation criteria taken from Community case law arising from the interpretation of Treaty provisions. This notion has been expanded to encompass all bodies that could be considered as engaging in 'economic' actions and deploying their own resources and personnel.[35]

Italian law, by opting to invoke Community principles, has enabled courts and the competition authority in Italy to refer directly to the European Community's more than 35 years of accumulated experience in the realm of competition. It was thus possible to lend substance to such general terms as 'undertaking', 'relevant market', 'restriction of competition', 'dominant position' and so on. As a result, legislative developments in Italy would seem consistent with the intention of making laws uniform throughout the Community - above all, with a view towards instituting the single market.

It is interesting to point out that the rule of competition for relevant national aspects, laid down for the authority, is similarly extended to judges charged with disputes in the matter of competition among private people as well, where relevant European aspects take shape.

Concerning the problem of reference to Community law or national law and to the competence of European or national institutions, we have to note that decisions of this first period of enforcement of national law[36] have established that the solution for these problems has to be found in relation to the claim and precisely with the assertions of the parties.

In addition, by reading Articles 2 and 3 of the national law, it can be confirmed that the law is enforced when competition is distorted "*in the national market or in a relevant part of it*".

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[33] In similar terms, see Commission Decision 72/21/EEC of 9 December 1971, Case *Continental Can* (OJ 1972 L 7/1972/p. 25 of 8 January 1972); and the Decree of the ECJ of 5 October 1988, Case C-247/86, *Société alsacienne et lorraine de telecommunications et d'electronique (Alsatel) v SA Novosam ('Alsatel v Novosam')*, ECR 1988, p. I-5987.

[34] Court of Appeal of Milan, Order of 31 January 1996.

[35] Cases specifically cited were *Mannesman*, Order of 13 July 1972; *Amm. Autonoma Monopolio di Stato*, Order of 15 June 1987; *Hofner v Macrotron*, Order of 23 April 1991; Commission Decision 89/190/EEC of 21 December 1989 relating to a proceeding pursuant to Article 85 of the EEC Treaty (Case IV/31.865, *PVC*, OJ 1994 L 239/1994/p. 14 of 14 September 1994); Commission Decision 94/894/EEC of 13 December 1994, relating to a proceeding pursuant to Article 85 of the EC Treaty and Article 53 of the EEA Agreement (Case IV 31.490, *Eurotunnel*, OJ 1994 L 354/1994/p. 66 of 31 December 1994).

[36] See Decisions of the Court of Appeal of Milan, of 23 January 1992, *Cavirivest v Nuova Samim*; of 5 February 1992, *MYC, Red Line, MGR v AFI, Virgin, Polygram, SIAE*; of 5 February 1996, *Comis v Ente fiera di Milano*; as well as Decision of the Court of Appeal of Rome, of 25 June 1993, *Parrini v Bizarri ed al*; Court of Appeal of Bologna, of 30 September 1995, *Negrini v Consorzio del Prosciutto di Parma*, followed by many other similar decisions.

Actually, the limits the national lawgiver has given to himself exceed those imposed by the EC Treaty. In fact, in accordance with Article 10 (ex Article 5 (2)) EC, the Member States must refrain from any measure which risks compromising the achievement of the purposes of the EC Treaty. Moreover, the line of the rulings of the ECJ, in the field of competition, has addressed the principle of the supremacy of Community law rather than national laws, indicating that concurrent enforcement of competition law by the Member States must not prejudice the complete and uniform implementation of Community law. The choice of the Italian lawgiver is, perhaps, too reductive in respect of these indications, but surely very careful.

Despite the subordinated role chosen by the Italian lawgiver, the delay in the intervention of the Italian antitrust law in the international and European context has allowed Italy to be in conformity with the guidelines drawn from the European system, and to supply the right directions in order to avoid decisions which clash regarding the same case.

DE L'EFFICACITE DE LA MISE EN ŒUVRE DU DROIT COMMUNAUTAIRE DE LA CONCURRENCE PAR LE JUGE NATIONAL A LA DIFFICILE CONNAISSANCE DU DROIT MATERIEL EUROPEEN

Claire Favre*

L'expérience des professionnels du droit avec le droit communautaire privé est un vaste sujet de réflexion, qui laisse songeur un juge plus habitué à répondre aux moyens de faits et de droit soulevés par les parties dans une affaire qu'à réfléchir sur le difficile problème de la friction entre le droit interne et le droit communautaire.

A ce sujet, je serai tentée de faire une distinction entre le droit communautaire institutionnel et le droit matériel. La pénétration de l'ordre juridique interne a connu une fortune diverse dans les deux cas.

S'agissant du premier, le Conseil d'Etat depuis l'arrêt *Nicolo*[1] a marqué la quasi fin de la résistance des ordres juridictionnels français au droit communautaire, l'ordre judiciaire s'étant plié à la réalité juridique depuis 1975.

Force est de constater qu'il est fréquent dorénavant de voir la Cour de Cassation française anticiper l'inaction fautive du législateur, à propos par exemple de la transposition de la Directive

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[1] Conseil d'Etat, arrêt du 20 octobre 1989, affaire *Nicolo*, Rec. Lebon 1989, p. 190.

Européenne du 25 juillet 1985 sur la responsabilité du fait des produits défectueux[2], avant la loi française du 18 mai 1998[3] qui a ajouté un Article 1386 au Code Civil.

Le problème surgit quand il s'agit de délimiter la portée respective du droit interne et du droit communautaire et s'aggrave lorsqu'un champ d'application étant commun, les deux droits ne sont pas conciliables: alors doit jouer le principe de primauté de la règle communautaire, et si ce pose une question d'interprétation, les juridictions, et en dernier ressort la Cour de Cassation française, sont obligées d'en demander le sens à la CJCE, ou, s'il s'agit d'un droit communautaire dérivé, d'en faire vérifier la validité par cette cour.

En vertu de ce principe de primauté, la Cour de Cassation française a énoncé depuis de nombreuses années que le Traité de la Communauté Européenne (Traité) avait une autorité supérieure à celle des lois, de sorte que la loi française, même plus récente que le Traité, tout en conservant sa validité, n'a pas à être appliquée lorsqu'elle entre en conflit avec une disposition de droit communautaire. C'est l'arrêt des *Cafés Jacques Vabres*[4] du 24 mai 1975. Ce principe de primauté s'étend au droit dérivé des traités et accords, c'est-à-dire aux règlements, directives ou décisions émanant des Institutions Communautaires. Et cette primauté va tellement de soi que la cour suprême se borne fréquemment à viser seulement la disposition du droit communautaire applicable.

Il semble donc qu'il ne doit pas y avoir de friction entre les deux ordres juridiques, interne et communautaire, le premier s'effaçant nécessairement devant le second en cas de contradiction.

C'est d'ailleurs l'expérience que j'ai pu avoir dans l'application du droit de la concurrence. En cette matière, la symbiose entre les droits communautaires et internes est peut-être facilitée par le

[2] Directive 85/374/CEE du Conseil, du 25 juillet 1985, relative au rapprochement des dispositions législatives, réglementaires et administratives des Etats membres en matière de responsabilité du fait des produits défectueux, JO 1985 L 210/1985/p. 29 du 8 juillet 1985 (modifiée par Directive 99/35/CE, du 10 mai 1999, JO 1999 L 141/1999/p. 20-21 du 4 juin 1999).

[3] Loi française No 389/98 du 19 mai 1998, Journal Officiel de la République Française du 21 mai 1998, insérant un Article 1386 (1-18) au Code Civil.

[4] Cour de Cassation, arrêt du 24 mai 1975, affaire *Cafés Jacques Vabres*.

fait que l'Ordonnance du 1 décembre 1986 relative à la liberté des prix et de la concurrence[5] consacre très nettement l'alignement des règles nationales relatives aux ententes et aux abus de position dominante sur le droit communautaire. Elle découle vraisemblablement aussi de ce que le droit interne est un droit nouveau, qui ne se heurtait pas à une habitude, une pratique judiciaire antérieure, et qui est essentiellement un droit jurisprudentiel, la jurisprudence française trouvant essentiellement sa source dans celle communautaire.

Toutefois, en pratique, le risque de conflit n'est pas nul lorsque le juge est saisi d'une pratique restrictive telle qu'un refus de vente alors que ce même comportement peut aussi relever du droit communautaire des ententes et bénéficier, le cas échéant, d'une exemption. La difficulté pour le juge sera alors de connaître le règlement d'exemption.

Le règlement de ces éventuels conflits est facilité par les communications de la Commission relative à la coopération.

La Communication de la Commission relative à la coopération entre la Commission et les juridictions nationales pour l'application des Articles 81 et 82 (ex Articles 85 et 86) Traité[6], de même que son pendant, la Communication relative à la coopération entre la Commission et les autorités de concurrence des Etats membres pour le traitement des affaires relevant des Articles 81 et 82 du Traité[7], n'innovent en rien puisqu'elles ne font que rappeler aux juges et aux autorités nationales leur compétence pour appliquer le droit communautaire et établir des processus de mise en œuvre de l'obligation de coopération loyale découlant de l'Article 10 (ex Article 5) Traité.

[5] Ordonnance No 1243/1986 du 1 décembre 1986 relative à la liberté des prix et de la concurrence (Journal Officiel de al République Française du 9 décembre 1986).

[6] Communication de la Commission, du 13 février 1993, relative à la coopération entre la Commission et les juridictions nationales pour l'application des articles 85 et 86 du Traité CEE (JO 1993 C 39/1993/p. 6).

[7] Communication de la Commission relative à la coopération entre la Commission et les autorités de concurrence des Etats membres pour le traitement des affaires relevant des Articles 81 et 82 du Traité (JO 1997 C 313/1997/pp. 3-11, du 15 octobre 1997).

Les compétences relatives à la mise en œuvre des Articles 81 et 82 du Traité procèdent à la fois du Règlement 17/62 du Conseil[8] pris sur la base de l'Article 83 (ex Article 87) Traité et de l'effet direct qui s'attache aux deux premiers articles précités.

Le Règlement 17/62 reconnaît une compétence aux 'autorités des Etats membres' pour appliquer les dispositions de l'Article 81 (1) et 82 Traité tant que la Commission n'a pas engagé de procédure.

La CJCE a opéré quant à elle une distinction entre les 'autorités des Etats membres' d'une part, et d'autre part les juridictions nationales. La notion d'autorité ne couvre pas les juridictions appelées à statuer à titre incident sur le droit communautaire de la concurrence dans les litiges de droit privé (arrêt *BRT v SABAM*)[9] ni les juridictions pénales (arrêt *Ministère Public v ASJES*)[10].

Or les Articles 81 (1) et 82 du Traité sont directement applicables puisqu'ils engendrent directement des droits dans le chef des justiciables que les juridictions nationales doivent sauvegarder.

Ainsi le juge national, saisi d'une action en nullité d'engagements, conventions ou clauses se rapportant aux pratiques d'entente illicite ou d'abus de position dominante, étant rappelé que le Règlement 17/62 n'attribue aucune compétence en la matière à une institution communautaire ou d'une action en réparation du préjudice causé par des pratiques anticoncurrentielles, devra appliquer le droit interne de la concurrence ou éventuellement le droit communautaire de la concurrence, et sa compétence n'est pas limitée, comme celle des autorités de concurrence, à l'absence d'engagement de procédure par la Commission.

Le juge national va donc apprécier les éléments de l'affaire dont il est saisi si les conditions d'application de l'Article 85 (1) du Traité ne sont manifestement pas réunies et s'il n'existe en conséquence guère de risque que la Commission se prononce un jour différemment, il va poursuivre la procédure pour statuer sur le contrat litigieux. Il en va de même lorsque l'incompatibilité du contrat avec l'Article 85 (1) du Traité ne fait pas de doute et que, compte

[8] Règlement du Conseil No 17/62 du 6 février 1962 - premier règlement de renforcement des ex Articles 85, 86 Traité (JO 1962 L 204/1962/p. 13, du 21 février 1962), mis en force il 13 mars 1962, et modifié par les règlements succédants.

[9] CJCE, affaire 127/73, *BRT v SABAM*, arrêt du 30 janvier 1974, Rec. 1974, p. 51.

[10] CJCE, affaire 209/84, *Ministère Public v ASJES*, arrêt du 30 avril 1986, Rec. 1986, p. 1425.

tenu des règlements d'exemption et des décisions précédentes de la Commission, le contrat ne peut en aucun cas faire l'objet d'une décision d'exemption au titre de l'Article 85 (3) (ex Article 81 (3)) Traité.

A cet égard, il ne faut pas perdre de vue qu'un contrat ne peut faire l'objet d'une telle décision d'exemption que s'il a été notifié ou s'il est dispensé de l'obligation de notification et qu'ainsi en l'absence de notification, la liberté d'appréciation du juge est plus grande.

En revanche, la question est plus délicate lorsque la juridiction nationale constate que le contrat litigieux satisfait aux exigences formelles de notification et si elle estime, à la lumière de la pratique réglementaire et décisionnelle de la Commission, que ce contrat peut éventuellement faire l'objet d'une décision d'exemption. Il semble, en pareil cas, que la jurisprudence de la CJCE l'engage à beaucoup de prudence. Ainsi, dans l'arrêt *Delimitis*[11], la CJCE indique qu'il y a lieu de tenir compte du fait que les juridictions nationales risquent de prendre des décisions allant à l'encontre de celles prises ou envisagées par la Commission pour l'application de l'Article 85 (3) du Traité et dit que «*de telles décisions contradictoires seraient contraires au principe général de la sécurité juridique*» et doivent dès lors être évitées lorsque les juridictions nationales se prononcent sur des accords ou pratiques qui peuvent encore faire l'objet d'une décision de la Commission. Le juge national ne peut donc exercer discrétionnairement sa compétence et si, à la différence des autorités des Etats membres, les juridictions ne peuvent se dispenser de se prononcer en raison de l'effet direct de l'Article 81 (1) ou de l'Article 82 du Traité, le risque de décisions contradictoires les amènera en règle générale à surseoir à statuer dans l'attente de l'issue de la procédure initiée par la Commission dès lors que la solution n'est pas évidente.

L'affirmation de la compétence exclusive de la Commission en matière d'exemption ou de retrait d'exemption, qu'il s'agisse d'une exemption par catégorie ou d'une exemption individuelle ne signifie pas pour autant que le juge national n'ait pas à tirer les conséquences d'une décision d'exemption, sous la réserve, bien évidemment, qu'il ne modifie pas la portée d'un règlement d'exemption en étendant, par exemple le champ d'application à des accords qui n'en relèvent pas.

[11] CJCE, affaire C-234/89, *Stergios Delimitis v Henninger Bräu AG*, arrêt du 28 février 1991, Rec. 1991, p. I-935.

En conséquence, s'agissant de la mise en œuvre de l'Article 81 (3) du Traité, le rôle assigné aux instances nationales paraît bien devoir se limiter à tirer les conséquences d'une exemption individuelle décidée par la Commission ou résultant d'un règlement d'exemption par catégorie après avoir constaté qu'il est applicable à l'accord en cause.

De manière concrète, la Communication du 13 février 1993[12] a l'avantage de définir les principes d'une coopération avec la Commission, même si dans le cadre institutionnel, le juge national ne dispose que de la procédure de renvoi préjudiciel de l'Article 234 (ex Article 177) du Traité pour porter une affaire dont il a la connaissance devant une Instance Communautaire.

Ce principe de coopération avait déjà été affirmé par la jurisprudence de la CJCE dans l'arrêt *Delimitis*[13] précité en ces termes:

«*Il y a lieu de préciser que la juridiction nationale a toujours la possibilité, dans les limites du droit national de procédure applicable et sous réserve de l'article 214 du Traité, de s'informer auprès de la Commission sur l'état de la procédure que cette institution aura éventuellement engagée et sur la probabilité que celle-ci se prononce officiellement sur le contrat litigieux en application des dispositions du règlement 17. La juridiction nationale peut, dans les mêmes conditions, contacter la Commission lorsque l'application concrète de l'article 85 paragraphe 1 ou de l'article 86 soulève des difficultés particulières, afin d'obtenir les données économiques et juridiques que cette institution est en mesure de lui fournir. La Commission est en effet tenue, en vertu de l'article 5 du Traité, à une obligation de coopération loyale avec les autorités judiciaires des Etats membres chargées de veiller à l'application et au respect du droit communautaire dans l'ordre juridique national*».

Les juridictions se voient donc offrir la possibilité de demander l'assistance de la Commission en sollicitant des renseignements sur l'état des affaires en cours, des consultations sur des points de droit, la fourniture de données factuelles, études de marché ou analyses statistiques ou économiques.

[12] *Supra*, note 6.

[13] *Supra*, note 11.

La mise en œuvre de cette coopération est conditionnée par le droit national de procédure: la saisine de la Commission s'analyse en fait comme une mesure d'instruction décidée par la juridiction ou, le plus souvent, à la demande des parties qui auront connaissance de l'existence d'une procédure communautaire. En réalité la pratique montre que la Commission est très souple et répond à une simple lettre de la juridiction.

Ainsi la Commission pourra utilement éclairer le juge sur la jurisprudence applicable au cas d'espèce, ainsi que sur sa pratique décisionnelle dans des cas similaires, étant observé que la jurisprudence de la CJCE constitue la référence suprême qui s'impose au juge national.

Pour ce qui est de l'application de l'Article 81 (3) du Traité, la Commission conçoit d'autant plus largement son intervention, lorsqu'il s'agit d'un domaine relevant de sa compétence exclusive. C'est dire qu'interrogée par une juridiction, elle sera dans l'obligation de procéder à un examen du fond de l'affaire même si elle rend alors un avis qui sera qualifié de provisoire.

Cet avis provisoire ne s'impose pas au juge. Cependant, et c'est la pratique appliquée par la Cour d'Appel de Paris à l'occasion d'une affaire *Fédération des Agents Consignataires de Navires et Agents Maritimes de France*[14], l'appréciation donnée constituera un élément de fait que la juridiction nationale pourra prendre en compte dans son examen de la conformité de l'accord en cause avec les dispositions de l'Article 81 du Traité.

Car la règle de l'indépendance du juge reçoit elle-même une correction fondée sur la nécessité de l'effet utile du Traité. La Commission, sans en avoir l'exclusivité et sans avoir le dernier mot en la matière, est gardienne des dogmes communautaires, ce qui explique qu'en principe, et sous réserve d'une appréciation différente du juge de Luxembourg, son avis est une indication de nature à contribuer à l'effet utile du Traité.

Mais à côté du principe de primauté, et de cette matière sans doute privilégiée qu'est le droit de la concurrence, la réalité révèle souvent la difficulté du praticien, non pas à appliquer le droit communautaire, mais tout simplement à avoir accès à ce droit. Il s'agit donc avant tout d'information et de connaissance.

[14] Court d'Appel de Paris, arrêt du 3 mars 1993, affaire *Fédération des Agents Consignataires de Navires et Agents Maritimes de France.*

En principe, c'est aux parties, en droit privé, d'invoquer la règle de droit applicable, et donc éventuellement le règlement communautaire, fondement de la demande. S'agissant d'une directive, elle est par nature transposée, de sorte qu'elle s'efface devant le texte de transposition, et me semble-t-il, le problème devient moins crucial.

Reste à 'découvrir' les multiples règlements et parfois accords qui ont pu en découler et à rechercher la jurisprudence s'y attachant.

C'est là que la démarche du juge, isolé, limité bien souvent à la lecture de ses codes n'est pas aisée.

Aussi, pour développer 'l'instinct communautaire' le Ministère de la Justice Français a institué l'année dernière des relais au sein des juridictions, plus spécialement auprès de chaque Cour d'Appel française en la personne de magistrats désignés en qualité de correspondants communautaires, appelés à servir de référents à leurs collègues.

Ces magistrats doivent interroger par exemple le bureau du droit communautaire et du droit comparé, attaché au service des affaires européennes et internationales du ministère pour savoir si, sur une question donnée, une décision a déjà été donnée. Ils doivent informer ce bureau des questions préjudicielles posées dans le ressort de leur cour, et il est souhaitable qu'ils transmettent à leurs collèges le suivi des procédures préjudicielles portées devant la CJCE, et ce quelle que soit la juridiction qui a posé la question, en raison du caractère fondamentalement jurisprudentiel du droit communautaire.

Ils sont les destinataires d'informations privilégiées notamment sur l'activité et la jurisprudence de la CJCE et du Tribunal de Première Instance des Communautés Européennes, et doivent communiquer au service des affaires européennes et internationales toutes les décisions rendues en matière communautaires dans le ressort de leur cour. Ils reçoivent le bulletin hebdomadaire élaboré par la Division Presse et Information de la CJCE sur les activités de la CJCE et du Tribunal de Première Instance des Communautés Européennes, qui fournit une information rapide mais complète sur le travail de l'institution.

Ils ont vocation à faire des stages auprès des Institutions Communautaires, à bénéficier de formations spécialisées, pour ensuite animer à leur tour, dans leur cour, des séminaires d'informations.

La Chancellerie édite tous les trimestres un supplément communautaire au courrier de la Chancellerie, destiné à informer les magistrats françaises sur l'actualité du droit européen et sur la jurisprudence essentielle de la CJCE.

Ainsi, le numéro de mars 1998 a présenté la Directive relative à l'exercice de la profession d'avocat dans un Etat membre autre que celui où la qualification a été délivrée[15], et s'agissant de la jurisprudence communautaire a résumé et commenté l'affaire *Marschall*[16] qui posait le problème de la discrimination fondée sur le sexe au regard d'une disposition du droit allemand prévoit qu'à qualifications égales, si les femmes sont présentes en nombre inférieur à un poste donné, elles doivent être privilégiées; par exemple, lors d'une promotion pour ce poste, à moins que des motifs tenant à la personne d'un candidat ne l'emportent. Et l'affaire dite des 'fraises espagnoles' où la France a été condamnée pour manquement à ses obligations découlant de l'Article 28 (ex Article 30) Traité, en liaison avec l'Article 10 (ex Article 5) Traité, et des organisations communes de marchés des produits agricoles, pour n'avoir pas pris toutes les mesures nécessaires et proportionnées afin que des actions de particuliers n'entravent pas la libre circulation des fruits et légumes.

Dans son numéro de juillet 1998, le Ministre a présenté la seconde Convention de Bruxelles sur les divorces en indiquant qu'il s'agissait d'une étape importante dans la construction d'un droit européen de la famille. Les couples bénéficiant désormais de règles efficaces assurant la coordination de la compétence des juges européens du divorce; facilitant la circulation de leurs décisions dans tous les Etats de l'Union Européenne; et faisant part, parce que cet instrument constitue une contribution essentielle à la construction de l'Europe judiciaire, de la décision du Ministre, prise en accord avec son homologue allemand, d'appliquer cette convention, sans attendre la ratification des autres membres de l'Union, par anticipation entre ces deux pays.

[15] Directive 98/5/CE du Parlement européen et du Conseil, du 16 février 1998, visant à faciliter l'exercice permanent de la profession d'avocat dans un Etat membre autre que celui où la qualification a été acquise (JO 1998 L 77/1998/pp. 33-43, du 14 mars 1998).

[16] CJCE, affaire C-409/95, *Helmut Marschall v Land Nordrhein Westfalen*, arrêt du 11 novembre 1997, Rec. 1997, p. I-6363.

Les correspondants communautaires ont également reçu du Service des Affaires Européennes et Internationales le fascicule *'Le passage à l'euro, guide de la commande publique de l'Etat'* ainsi qu'une note attirant leur attention sur le Rapport Annuel de la Commission sur le contrôle de l'application du droit communautaire en 1997[17], paru au Journal Officiel des Communautés Européennes du 10 août 1998, avec en annexe copie de l'avant propos et des généralités sur la libre circulation, des principaux éléments statistiques ainsi que de l'état fait de l'application du droit communautaire par les juridictions nationales.

Ainsi la connaissance, l'accès et la découverte du droit pertinent applicable seront, je l'espère, facilité, car le problème du présent me paraît bien plus être celui de la connaissance que de celui de l'applicabilité, tant les principes en la matière sont maintenant acquis par les juridictions. Reste, qu'au-delà de cet effort national, un travail peut-être de codification européenne serait souhaitable, car le juge est perdu sans son code.

[17] Quinzième rapport annuel de la Commission sur le contrôle de l'application du droit communautaire – 1997 (JO 1998 C 250/1998/pp. 1-204, du 10 août 1998).

ITALIAN ANTITRUST LAW DEVELOPMENT AND ITS LINKS TO THE EC TREATY RELATIVE TO NEW MARKET ISSUES

Massimo Scuffi*

1 Introduction

In the Italian legal system of market competition, the relations between European economic law and national private law assume great importance. The interior rules of the Italian legal system have, by absorbing the Community judicial experience, slowly adapted to the new economic reality. This process has lead to the foundation of a normative *corpus* which, today, constitutes the Italian Antitrust Law (Act No 287/1990).[1]

Before this national Antitrust Law came into force, antitrust practices, such as agreements and concerted actions which restrain market access, monopolisation or abuse of a dominant position, and cartels and mergers which produce offensive foreclosures,[2] all of which were forbidden by the EC Treaty as being 'incompatible' with the EC Treaty, had been punished by measures such as, to give an example, 'boycotting', i.e., undertakings refusing to deal with another undertaking. This was possible by interpreting the Italian rules concerning unfair competition (in particular Article 2598 of the Italian Civil Code about fair-trade practices) in line with Article 81 ff. (ex Articles 85 ff.) EC,[3] which have not usually been applied against methods of domestic competition without detriment to foreign trade.

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[1] Act No 287 of 10 October 1990 "*Norme per la tutela della concorrenza e del mercato*", published in the Gazz. Uff. No 240 of 13 October 1990 ('Antitrust Law').

[2] Articles 85 and 86 (ex Articles 81, 82) EC and Council Regulation 4064/89/EEC of 2 December 1989 on the control of concentrations between undertakings (OJ 1989 L 395/89/p. 1 of 30 December 1989).

[3] District Court of Milan and Court of Appeal of Milan; Decisions of 22 March 1976 and 24 November 1978, Case *Scic v Dentalica*.

The Italian Antitrust Law has filled this gap by forming, through Articles 2, 3, and 6, equivalent model situations of national prominence. Article 10 of this Law has given the power of interference in the market to a special public authority, the so-called Guarantor of Competition and Market, in order both to combat restrictive trade practices and to restore the economic balance in the general interest of firms and consumers. Furthermore, Article 33 of the Antitrust Law fixes the concurrent jurisdictions of the various national Courts of Appeal when they are called to settle private disputes between corporations or partnerships with regard to compensation for the damages caused by the malpractices committed by other undertakings.

In recent years, the Italian judiciary has been called upon to adjudicate in new matters concerning unfair competition, which are not expressly provided for by the antitrust regulations, involving both the administrative jurisdiction (i.e., Regional Tribunals, the Italian Council of State and the disciplinary measures of the Authority) and the civil jurisdiction of the District Courts.

Italian justice has usually followed the precedents of the European Commission and the ECJ, but it has also put its own constructions upon unusual trends of economic activity. Unfortunately, these constructions have never succeeded in creating sufficient protection for consumers who are indirectly injured by antitrust practices. This report will attend to these new economic problems by reviewing the line of decisions of the national Courts and the Community Courts.

2 Anti-competitive agreements

Article 2 of the Italian Antitrust Law forbids 'agreements' (i.e., commercial contracts) and 'concerted actions' (i.e., 'implied' agreements or 'fiduciary' relationships) which restrain free competition on the market.

In this matter, the Court of Appeal of Milan has established important principles. In a case where the International Exhibition of Milan and the Italian Fur Association (AIP) refused to place proper show-rooms at the disposal of associations which were organising trade exhibitions in the field of fur wear, the Court decided that 'non profit' organisations, too, were subject to the antitrust rules if they were "*permanently*

organised to carry out an economic programme".[4] Thus, we have before us an amplification of the concept of the undertaking, which results from the judicial construction based on Community precedents regarding 'non profit holding'. This construction has been created by Community jurisdiction in order to prosecute any malpractice carried out in the Common Market, irrespective of the nature of the legal person who has launched it.[5]

However, the basic factor of the antitrust 'logic' - which takes no interest in moral or political matters - remains the genus of the economic relations. This is illustrated by the Italian case *Referendum Committee v Fininvest*. In this case, a committee promoted a referendum against the Fininvest group, accusing it of abusing its dominant position in the private networks by broadcasting commercial advertisements contrary to the repeal of the law. The Italian court subsequently dismissed the action brought by the committee.[6]

In another case, institutions which were organising trade exhibitions issued regulations which denied 'parallel importers' of air conditioners access to the exhibitions because they were not 'sole distributors'. The Court of Appeal of Milan had to decide whether this was a case of a 'concerted action'. The Court excluded the presence of a concerted action because a concerted action would presuppose a common psychological factor.[7] In fact, the coincidence of intents, or 'conscious parallelism' without planning, is neither provided for by the national Antitrust Law nor by the equivalent rules of the EC Treaty (i.e., Articles 81 ff. EC) which, up until now, have given an inadequate reply to these new market problems.

Moreover, the administrative justice has marked an involution in the matter of 'agreements' in the restraint of trade. The Italian Council of State interpreted an arrangement among primary insurance companies which, in addition to converging lines of competition, had fixed common franchise clauses and rates in a *formalistic* manner. According to the Council of State, such anti-competitive co-operation should not be

[4] Court of Appeal of Milan, Order of 31 January - 5 February 1996, Case *Comis v International Exhibition of Milan and AIP*.

[5] *Cf* recently ECJ, Decision of 18 July 1998, Case *European Commission v Italian Republic* (removed from the ECJ Register).

[6] Court of Appeal Rome, Order of 6-12 April 1995, Case *Referendum Committee v Fininvest*.

[7] Court of Appeal of Milan, Decision of 5-21 March 1997, Case *Climasystem v Exhibition of Padova and Senaf*.

punished by (Article 2 of) the Italian Antitrust Law because the people attending the meetings were officers of the insurance companies who had no legal representation.[8]

In contrast, the Community authorities took action which attached great importance to the *substance* of the antitrust agreements. The Commission stated that such agreements would be referable to the companies even if they were successfully brought to an end (by attendants), because they would be well-known to the companies and thus would have been implicitly approved by them.[9]

In my opinion, this is the right approach to the problem because antitrust rules must always be interpreted in a 'pragmatic' way in order to discover hidden or dubious behaviour which is capable of manipulating the market.

Just as an anti-competitive 'agreement' does not necessarily presuppose a valid 'contract' according to the national law,[10] civil liability does not necessarily depend on the existence of an organic or voluntary 'representation'. Likewise, the idea of 'concerted actions' must be enlarged to all those practices of a 'gentleman's agreement' which substantially pursue anti-competitive purposes. On the other hand, antitrust interdictions shall remain inoperative only in presence of trade activities which, even if similar in their 'effects', are really mutually 'independent' and/or 'natural' and simply 'fortuitous' in their possible correlation.

3 Abuse of dominance

Antitrust conduct is characterised by 'improperty' and 'lack of justification'; it is frequently the result of restrictive trade plans realised by companies holding market dominance. In fact, Article 3 Antitrust Law does not forbid the dominance but the abuse of the dominance which causes damage to competitors by unfair methods.

Both national and Community justice have usually intervened against 'anomalous' and 'groundless' trade practices which, in effect, produce restraints on market access.[11]

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[8] Council of State, Decision 1796 of 30 December 1996, Case *Lloyd Adriatico v Authority*.

[9] Commission Decision 86/398/EEC of 23 April 1986 relating to a proceeding under Article 85 of the EEC Treaty (Case IV/31 149 – Polypropylene, OJ 1986 L 230/1986/p. 1 of 18 August 1986).

[10] ECJ, Case 277/87 of 11 January 1990, *Sandoz Prodotti Farmaceutici v Commission*, ECR 1990, p. I-45.

[11] ECJ, Case 102/77 of 13 February 1979, *Hoffmann- La Roche v Commission*, ECR 1978, p. 1139.

Consequently, Italian Courts have exempted from antitrust rules only conduct which was based on the principle of freedom of contract.

The following conduct, for example, was considered lawful: in the spare parts market, a producer requested a contract form from his distributor, to whom the hypothesis of a new commercial relationship involving inferior conditions to that reserved for the official licensee had been advanced. This arrangement was deemed not to be 'discriminatory'.[12] Similarly, the revocation of policy imposed by Alitalia on Italian travel agents who were authorised to issue air tickets was allowed even though the State Airline had subordinated the granting of new licenses to terms and conditions of contract which provided for less agent's commission in consideration of a policy of rationalisation and control of domestic charges.[13] In both cases, we can see behaviour which is justified by 'contractual autonomy' on the one hand, and the intention of the competitors simply to continue profiting by the more favourable treatment in force before the expiry of the contracts on the other hand. Clearly, in these situations, no antitrust law enforcement is possible.

4 'Lobbying'

Instead, other market phenomena which are apparently licit, are, at present, being investigated by antitrust law. I allude to the 'lobbying' practice. In this matter, some decisions of Italian Courts of Appeal have been diametrically opposed to the Community precedents, representing self-sufficient wordings on this subject.

As everybody knows, 'lobbying' is the practice of special interest groups or pressure groups who attempt to influence legislation or political institutions by a campaign of publicity, with the effect that they inflict direct injury upon the interests of the party against whom the campaign is directed.

According to the US 'Noerr-Pennington' doctrine,[14] the Sherman Act does not prohibit two or more persons from associating in an attempt to persuade the legislature or the executive to take particular actions with respect to a law that would produce a

[12] Court of Appeal of Milan, Order of 10-16 January 1996, Case *Scamm v Fki Komatsu Ind.*

[13] Court of Appeal of Milan, Decree of 24 June – 2 July 1998, Case *Fiavet v Alitalia.*

[14] The name originates from two Decisions of the US Supreme Court in the sixties: Case 365 U.S. 127 (1961) of 20 February 1961, *Eastern Railroad Presidents Conference et al v Noerr Motor Freight, Inc., et al*); and Case 381 U.S. 657 (1965) of 7 June 1965, *United Mine Workers of America v Pennington et al*).

restraint or a monopoly, although such associations could possibly be ascribed to the general proscription of 'combinations in restraint of trade'.

The basis of this principle is that American antitrust law, by virtue of the First Amendment Rights regarding freedom of expression and speech, only involves the economic, but not the political, process, unless derogated in extreme situations of 'social danger' (i.e., the 'sham exception' when somebody, to delay matters, is not interested in the measures demanded by the public authorities in order to burden the competitors with heavy additional charges).

We find examples of the 'Noerr-Pennington' doctrine in the Community judicial practice which has confirmed that antitrust rules generally have nothing to do with relations between undertakings and the political establishment. One example is the *Shipping Committees* case where the committees asserted the common interest of the members by political bodies.[15]

At the beginning, the Italian courts followed this way of acting. I remember the case of a trade association which, in the field of the major distribution of goods, took a series of initiatives at political and administrative level, such as warnings to citizens, petitions, complaints, etc., in order to prevent the opening of a hypermarket of the French group Auchan, which could have jeopardised the environmental safety because it was situated near a dumping area.[16] On this occasion, the Court of Appeal decided that, as a matter of fact, such 'disturbance' by the trade association was not addressed to the market and simply represented freedom of expression, the inspiring reasons of which could not be inspected.

In contrast, the same Court of Appeal recently decided to apply antitrust sanctions against a lobbying agreement by which a group of Sicilian undertakings held almost the whole regional market of polyethylene film.[17] These firms turned to public opinion and local institutions in order to block the factory installation of a third competitor in that area, warning of noxious effects on both employment and the economy as a consequence of market saturation. The Court decided that such impeachment did not

[15] Commission Decision 91/262/EEC of 1 April 1992 relating to a proceeding pursuant to Articles 85 and 86 of the EEC Treaty (Case IV 32 450 *French – West African Shipowners' Committees*, OJ 1992 L 134/1992/p. 1 of 18 May 1992).

[16] Court of Appeal of Milan, Order of 24 April – 15 May 1996, Case *Auchan v Faid*.

[17] Court of Appeal of Milan, Order of 9 July 1998, Case *Tramaplast v Macplast*.

represent the utilisation of a 'right' for the judicial defence of legal situations but an anti-competitive plan carried out by undertakings in a dominant position with a view to restraining market access, even though the conduct took place on 'neutral ground' with regard to antitrust law.

This decision is very important because it shows that antitrust practice is not just characterised by anomalous and unjustified trading methods. In fact, a democratic relationship between firms and public authorities may also become the ground of an antitrust practice if it is intended to prevent market competition and preserve the *status quo* to the advantage of the local contractors.

5 Consumer protection

Finally, I would like to observe the protection which consumers may expect from the antitrust rules. The party injured by antitrust practices is not only the trader who is excluded from the market as the final purchaser or consumer who, as the last link in the distribution chain, also indirectly suffers damages from the rise of prices or the loss of quality of the goods.

The Italian Antitrust Law expressly provides for damages resulting from abuse of dominance to consumers (Article 3b Antitrust Law). However, it is silent about the way of repressing these 'indirect' effects of antitrust torts. This is probably due to the difficulty in identifying the causal link between anti-competitive conduct and the pecuniary damages suffered by the consumers. Naturally, the consumer is interested in the correct course of competition, but it is problematic to raise this interest to the level of a 'right' to compensation for the damages caused by antitrust practices. In fact, the consumer normally accepts both the advantages and the disadvantages of the market as 'natural effects'.

Another difficulty, which, fortunately, has been overcome by the new Italian Consumer Law,[18] concerns the 'access to justice' which involves the problem of *legitimatio ad processum* of consumer associations. The general civil rule in the matter of unfair competition (Article 2601 of the Italian Civil Code) attributes the 'action in tort' only to trading associations. Notwithstanding the attempts of the consumer

[18] Act No 281 of 30 July 1998 "*Disciplina dei diritti dei consumatori e degli utenti*", published in Gazz.Uff. No 189 of 14 August 1998 ('Italian Consumer Law').

associations to enlarge the scope of the provision to themselves,[19] the Constitutional Court has confirmed the closed interpretation.[20] However, 'access to justice' has always been provided by law in specific areas and in pursuance of the Community directives.

Thus, in matters of misleading advertising,[21] both the consumers and their associations are entitled to plead their own cases to administrative and civil courts (Article 7 of the Italian Law on Misleading Advertising):[22] whilst in matters of doorstep selling and related practices[23] the 'action in contract' is granted to the single consumer who is qualified to withdraw from the agreement after a cooling off period.

With regard to this point, Italian courts have recently given more effectiveness to consumer protection by way of two lines of decisions: On the one hand, they have enlarged the legal concept of 'consumer' defined by law (i.e., Article 2 of the Italian Consumer Law)[24] to 'a natural person who acts out of his practice' to cover also partnership.[25] On the other hand, they have given a narrow interpretation of the term 'practice', i.e., 'any activity in close connection to someone's own profession'. For example, a surgeon specialised in radiology who buys a 'refresher' compact-disc which covers all fields of knowledge including medicine is considered a simple consumer.[26]

Furthermore, the Italian Antitrust Law entitles consumer associations to lodge complaints to the antitrust authority in order to enable preliminary investigations on

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[19] District Court of Milan; Decree of 7 February 1980, Case *Daniels v Bartolini*.

[20] Italian Constitutional Court, Order No 59 of 21 January 1988.

[21] Italian Parliament, D.Lgs. No 74 of 25 January 1992; and Council, Directive 84/450/EEC of 10 September 1984 relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning misleading advertising (OJ 1984 L 250/1984/p. 17 of 19 September 1984). Directive 97/55/EC of 6 October 1997 amending Directive 84/450/EEC concerning misleading advertising so as to include comparative advertising (OJ 1987 L 290/1987/p. 18). The new title of the modified directive is now 'Directive (...) concerning misleading and comparative advertising.'

[22] Similarly, see District Court of Ravenna, Decree of 18 August 1984, Case *Gesco v Valle Spluga*; where the judge admitted the 'intervention' in the legal proceeding of the national consumer association in defence of the trade mark.

[23] Italian Parliament, D.Lgs. No 50 of 15 January 1992; and Council Directive 85/577/EEC of 20 December 1985 to protect the consumer in respect of contracts negotiated away from business premises ('Doorstep Sales') (OJ 1985 L 372/1985/p. 31 of 31 December 1985).

[24] Article 2 of the Italian Consumer Law states: "*Ai fini della presente legge si intendono per: a) 'consumatori e utenti': le persone fisiche che acquistino o utilizzino beni o servizi per scopi non riferibili all'attività imprenditoriale e professionale eventualmente svolta; b) 'associazioni dei consumatori e degli utenti': le formazioni sociali che abbiano per scopo statuario esclusivo la tutela dei diritti e degli interessi de consumatori o degli utenti.*" (see *supra*, note 18).

[25] *Cf* District Court of Milan, Decision of 5 January 1998, Case *Autofficina Lattanzio snc v Italtronics*.

[26] *Cf* District Court of Milan, Decision of 30 April 1998, Case *Frigerio v Dataloser*.

'combinations' in restraint of trade or 'abuses' of dominant positions (Article 12 Antitrust Law).

However, in Italy, it has always been excluded that consumers and their associations have always been excluded from the entitlement to file law suits on behalf of the victims of antitrust torts directly before an administrative court (i.e., the Regional Tribunals) or a civil court (i.e., the Courts of Appeal).[27] The reason is that, until recently, the Italian legal system did not provide for a general *legitimatio ad processum* of consumer associations, much less for 'class actions' according to the US model; nor was judicial discretion able to supply groups or bodies which represent the 'class of consumers' with *legitimatio ad processum.*

Thus, I strongly applaud the fact that the Italian Consumer Law which has recently entered into force has, by establishing the 'National Council of Consumers and Users',[28] finally conceded to such consumer associations which are registered in a special list, the legal representation of the consumers before the courts. Thus, a category similar to the 'representative actions' granted by Community law has been introduced in our judicial system.[29]

I suppose that such general *legitimatio ad processum* will also help consumers to obtain judicial aid against violations of antitrust rules, provided that the consumers succeed in demonstrating a serious, and not fortuitous, causality between such illicit practices and the damages suffered. However, we shall still have to wait for the decisions of the courts in order to have a correct solution of all the related problems, such as the amplitude of the due process of law, the structure of the action and, above all, the subjective limits of *res judicata.* In fact, in the Italian law system, a judgment is mandatory only for the parties and their privies; there is no rule of equity that offers an exception to this principle. Thus, I anticipate that it will be necessary to find new judicial remedies in order to extend the effects of inhibitory orders against undertakings to the consumers.

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[27] Italian Council of State, Decision of 30 December 1996 (see *supra*, note 8).

[28] Article 4 Italian Consumer Law: "*Consiglio nazionale dei consumatori e degli utenti*" (see *supra*, note 18).

[29] According to the EC Green Paper on access of consumers to justice and the settlement of consumer disputes in the Single Market (COM/93/576/final/p. 111 of 16 November 1993) and Article 153 (ex Article 129a) EC, the Italian Consumer Law conforms to Parliament and Council Directive 98/27/EC of

19 May 1998 on injunctions for the protection of consumers' interests (OJ 1998 L 166/1998/p. 51 of 11 June 1998) granted in all consumer matters.

THE COMMUNITY JUDGE AND THE NATIONAL JUDGE: THE FRANCOVICH CASE

Giovanni Giacalone*

1 Introduction

In some recent decisions,[1] the Italian Supreme Court (*Corte di Cassazione*) has re-examined the nature of the compensation that is owed to workers employed by insolvent enterprises due to the failure of the Italian State to implement EC Directive 80/987.[2] The judgments appear especially interesting as, for the first time, the Italian Supreme Court has stated the indemnifying nature of this compensation as a real indemnity for damages pursuant to Article 2043 of the Italian Civil Code.[3] The identification of the above-mentioned salary compensation was necessary in order to establish whether interest and re-evaluation were due on this 'credit' (and from which date). Up to now, the Italian Supreme Court, in spite of admitting that interest was due, has justified this decision by resorting to the category of '*credito di lavoro*' (i.e., 'salary credit').

2 The Community rule

Directive 80/987 has harmonised the legislation of the Member States with regard to protection of employees whose employers are insolvent, delegating the State with the task of creating 'guarantee trusts' in order to ensure, even for a limited period of time, the payment of the unpaid salaries of workers which had increased during the impending crisis of the enterprise.

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* Judge of the Corte di Cassazione of Rome.

[1] Corte di Cassazione, Decision No 5846 of 11 June 1998; Decision No 6113 of 18 June 1998; and Decision No 6223 of 23 June 1998.

[2] Council Directive 80/987/EEC of 20 October 1980 on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer. OJ 1980 L 283/80 of 20 October 1980 (see, recently, Council Directive 87/164/EEC of 2 March 1987 amending, on account of the accession of Spain, Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer, OJ 1987 L 66/87/p. 11 of 11 March 1997).

[3] Article 2043 Codice Civile reads: "*Risarcimento per fatto illecito: Qualunque fatto doloso o colposo, che cagiona ad altri un danno ingiusto, obbliga colui che ha commesso il fatto a risarcire il danno*".

However, the Italian State failed to fulfil its obligations in respect of the Directive, the implementation of which was due by 24 October 1983. Consequently, Italy was condemned by the ECJ for an infringement proceeding taken by the Commission under Article 226 (ex Article 169) EC.[4]

3 The delayed implementation in Italy and the Francovich judgment

By way of Article 48 of Legislative Decree (D.Lgs.) No 428/90,[5] the Italian legislator finally codified the principles and executive criteria for delegating powers to the Italian Government in order to implement the Directive.

Prior to issuing this Act, and subsequent to some requests for prejudicial judgment under Article 234 (ex Article 177) EC made by judges of the Court of First Instance of Vicenza and Bassano del Grappa, the ECJ passed the famous *Francovich* judgment.[6] This judgment has been defined as the absolute star of Community jurisdiction,[7] giving rise to not less than ninety comments. According to the ECJ, Community law establishes the principle that the Member States are bound to compensate any damage which they cause to individuals by infringements of Community law. Later, this principle was affirmed precisely in terms of damages deriving from the omitted implementation of Directive 80/987, although this Directive is deemed as basically inadequate for producing direct effects on the juridical relationship between a Member State and its citizens.[8] However, since the Directive had not been implemented in due time by the Italian State, the workers of the bankrupt firm could not claim their rights before national tribunals. Thus, the Italian State was held liable for the damages suffered by workers due to its failure to the implementation.

The judgement has raised quite a few systematic and interpretative problems which, basically, were linked to a twofold need: firstly, it has become necessary to establish - if one can imagine it

[4] ECJ, Case C-22/87 of 2 February 1989, *Commission v Italy*, ECR 1989, p. 143.

[5] Legislative Decree (*Decreto Legislativo*, D.Lgs.) "*Legge Communitaria*" No 428/90 of 29 December 1990, Gazz. Uff. 234 of 5 October 1991.

[6] ECJ, Case C-6/90 and C-9/90 of 19 November 1991, *Francovich et al v Italian Republic*, ECJ 1991, p. I-5357.

[7] *Cf* Pardolesi, (1996) *Danno e responsabilità: problemi di responsibilità civile e assicurazioni (rivista bimestriale)*, p. 86.

[8] In fact, the Directive has specified neither the organ to be instituted as the guarantor, nor the respective security instruments.

– an illicit act by the State against individuals in the event of a failure to adopt a Community legislative act which is not immediately effective. Secondly, it has become necessary to identify what the juridical situation, as recognised and guaranteed by the legal order, which had been injured by the inaction of the State, actually was.

4 The 'way out' of the Italian legislator

In 1992, the Italian legislator, probably in order to limit the consequences of the ECJ's decision, issued the '*Decreto Legislativo*' No 80/92.[9] This Act not only implements the Directive by ordering that the payment of unpaid salaries (within the last three months of the work-contract and including twelve months before the opening of bankruptcy proceedings) be obtained from a 'guarantee trust' to be established by the National Social Security Institute (INPS),[10] it also provides that the terms, the extent, and the modalities of determining the credit of salaries on the basis of the above-mentioned scheme, shall be applicable on damages stemming from the failed implementation of Directive 80/987, on the basis of an action brought by an insured worker within the expiry term of one year since the entry into force of the Act (Article 2 (7) D.Lgs. 80/92). The latter provision was provided in order to determine the indemnity for bankruptcy proceedings held before the entry into force of the Legislative Decree.

So, a kind of positive and special discipline was established for the infringements resulting from the non-implementation of the above-mentioned Directive. However, the solution of the Italian legislator, instead of reducing the implementation problems of the new situation brought on by the ECJ, increased them notably. In fact, the pragmatic solution turned out to be particularly inadequate for three reasons: firstly, it fails to identify the subject to bear the damages stemming from the inaction of the legislator; secondly, it fails to assigning the competent judge (i.e., whether a labour law judge is competent or whether any other judge is competent respective of the sum in dispute); thirdly, in terms of effective protection, it has shortcomings with regard to the adequacy of both the compensation amount and the expiry term which was set. More generally, the solution chosen by the Italian legislator does not deal with the

[9] D.Lgs. No 80/92 of 27 January 1992.

[10] *Istituto Nationale della Previdenza Sociale* (INPS); see Act No 297/82 ("*Disciplina del trattamento di fine rapporto e norme in materia pensionistica*") of 29 May 1982, Article 2: "*Fondo di garanzia. - E' istituito presso l'INPS il 'Fondo di garanzia per il trattamento di fine rapporto' con lo scopo di sostituirsi al datore di lavoro in caso di insolvenza del medesimo nel pagamento del trattamento di fine rapporto, di cui all'articolo 2120 del codice civile, spettante ai lavoratori o loro aventi diritto.* (...)".

question of how to classify the new category of illicit acts within the traditional scheme of extra-contractual liability at all. This was (and still is) considered to be a major problem in view of the fact that the ECJ, in conformity to its consolidated line, has left to the national judge the task of applying the national provisions on State liability for the consequences of the damages which the State itself had caused;[11] furthermore, the ECJ ruled that the formal and essential conditions which national laws have established in the field of liability "*must not be devised in such a way as to make it practically impossible, or exceedingly difficult to obtain compensation*".[12]

Under the pressing flow of claims subsequently brought by workers, national jurisprudence was called to take a stance.

5 The position of the Italian Constitutional Court

The Constitutional Court in its first ruling on this issue took a clarifying line.[13] It declared that the point of constitutional legitimacy of Article 2 (7) D.Lgs. 80/92, which had been raised by the Pretore of Frosinone for violation of Article 76 of the Italian Constitution,[14] was groundless, as the Court could not find any alleged violation of legislative delegation according to D.Lgs. 428/90.[15] Particularly, the Court confirmed that the adequate level of remedies required by the ECJ in the *Francovich* judgment,[16] compared to similar claims in internal law, had been satisfied. In a nutshell, Article 2 (7) D.Lgs. 80/92 is devised in such a way as practically to produce a similar result to that of the retroactivity of the discipline which rules 'guarantee trust' intervention in the operative scheme. On this occasion, the constitutional judges affirmed that INPS might also be sued for compensation pursuant to Article 2 (7) D.Lgs. 80/92, and that such disputes, in so far as they are supported by a precedent employment, can be ascribed to labour

[11] *Cf* recital 42 of the *Francovich* judgment (see *supra*, note 6).

[12] *Cf* recital 43 of the *Francovich* judgment (see *supra*, note 6).

[13] Constitutional Court, judgment No 285 of 16 June 1993.

[14] Article 76 of the Italian Constitution reads: "*The exercise of the legislative function may not be delegated to the government if the principles and guiding criteria have not been established and then only for a limited time and for specified ends*".

[15] See *supra*, note 5.

[16] See the above-mentioned recital 43 of the *Francovich* judgment (*supra*, point 4).

relationships according to Article 409 (1) of the Italian Code of Civil Proceedings.[17]

In a subsequent judgment, the Constitutional Court confirmed that INPS was the legitimate defendant in the cases at hand.[18] The Court also confirmed the indemnifying nature of the compensation claimed by the insured workers under Article 2 (7) D.Lgs. 80/92 - therewith negating the qualification as 'salary credits'. Among other reasoning, the Court strengthened its argument by referring to Article 48 (g) D.Lgs. 428/90, on the basis of which the implementation of the Directive must not entail a budgetary burden for the State or its public bodies.

6 The initial position of the Italian Corte di Cassazione

When called to define judicial competencies, the *Corte di Cassazione* stated that a claim brought by a worker under Article 2 (7) D.Lgs. 80/92, for the compensation for damages resulting from the non-implementation of Directive 80/987, falls within the jurisdiction of the Pretore, who exerts the functions of a labour law judge according to Article 409 (1) c.p.c.[19] The *Corte di Cassazione* confirmed this line of decision in several other judgments.[20]

When the *Corte di Cassazione* was called upon to decide whether INPS or the Italian State was to be sued in view of obtaining the 'guarantee trust' intervention under Article 2 (7) D.Lgs. 80/92, a detailed decision of the Labour Chamber of the Court stated that INPS was the responsible body for the paying of the compensation. The decision was founded on the ground that, on the one hand, the subjective right of the individual to exercise legislative powers does not exist in the Italian system; and on the other, that it is impossible to define a particular character of the State order as an illicit act ascribable to the State as body corporate under Article 2043 Civil Code. This fact entails the consequence that the claim for the compensation for damages caused by the failed implementation of the Directive is to be qualified as a claim for indemnifying a patrimonial diminution due to the exercise of a power which cannot be submitted

[17] Article 409 (1) c.p.c. declares: "*Controversie individuali di lavoro. - Si osservano le disposizioni del presente capo nelle controversie relative a: 1) rapporti di lavoro subordinato privato, anche se non inerenti all'esercizio di una impresa;* (...)."

[18] Constitutional Court, judgment No 512 of 31 December 1993.

[19] Corte di Cassazione, Decision No 9475 of 11 November 1994, in Foro it. 1995, 1.

[20] *Cf*, among others, Corte di Cassazione, Decision No 9475 of 11 November 1994; Decision No 9339 of 9 November 1994.

to adjudication.[21]

7 Subsequent judgments of the ECJ

In the prejudicial affair, the so-called *Francovich II* case,[22] the ECJ held that Directive 80/987 was applicable to all employees "*whose employers, under the domestic law applicable to them, can be submitted to measures on their assets so as to satisfy collectively the creditors*", even if this, in terms of the subjective scope of application, was contrary to D.Lgs. 80/92.

The subsequent cases *Brasserie du Pêcheur* and *Factortame III*[23] have enjoyed an even greater resonance, since they reconstructed in a detailed and systematic manner that, in full conformity with Community law, the Member States are obliged to compensate damages caused to single persons for violations of Community law ascribable to the State. The judgment specified that the principle is also applicable when the legislator was the author of the violation, and when the violation concerned Community norms with direct effect. The judgment also stated that the jurisdiction of the Member States' systems for fixing the compensation amount is subject to criteria of effectiveness and adequate protection provided by Community jurisprudence.

8 The latest jurisprudence of the Italian Corte di Cassazione

In its more recent statements on this issue, the *Corte di Cassazione*, despite confirming that INPS has passive standing before the courts, started to review the arguments by which it had denied the indemnifying nature of the obligations stated in Article 2 (7) D.Lgs. 80/92[24] in so far as motivations would only recall elements which were singled out by the Italian Constitutional Court when identifying the legitimate subject,[25] and it occasionally underlined the compensative or indemnifying nature of the salary credit in question.[26]

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[21] Corte di Cassazione, Decision No 10617 of 11 October 1995.

[22] ECJ, Case C-479/93 of 9 November 1995, *Francovich v Italy ('Francovich II')*, ECJ 1995, p. I-3843.

[23] ECJ, Cases C-46/93 and C-48/93 of 5 March 1996, *Brasserie du Pêcheur v Bundesrepublik Deutschland* and *The Queen v Secretary of State for Transport ('Factortame III')*, ECR 1996, p. I-1029.

[24] See *supra*, point 6.

[25] Corte di Cassazione, Decision No 3013 of 7 April 1997; Decision No 7770 of 23 August 1996; Decision No 2750 of 27 March 1996; *ivi* 1996, 981; Corte di Cassazione, Decision No 1860 of 8 March 1996; Decision No 283 of 15 January 1996.

[26] Corte di Cassazione, Decision No 5315 of 13 June 1997.

This change of jurisprudence becomes even more evident when analysing the accessories to the salary credit, i.e., the matter of interest and monetary re-evaluation, due as compensation for the failed implementation of the Directive. In its first judgments on the matter, the *Corte di Cassazione* expressed its doubts on the possibility of defining the entitlement to compensation as an 'indemnifying credit', "*because of the difficulty of ascribing the breach of the State system for failure to comply with the Community rulings in time, to negligent behaviour by the State* (i.e., liability *ex lege* vested in the INPS).[27] Nevertheless, the Court admitted the entitlement to interests and to re-evaluation, either because the compensation belonged to the category of 'salary credits' and therefore automatically deserved interest and re-evaluation by the judge under Article 409 c.p.c.,[28] or because it could be considered as a 'value credit' being, in any given case, inherent to the damage, even if it did not fall under Article 2043 of the Italian Civil Code.[29]

Signs of this new trend can be seen in another recent judgment[30] in which the *Corte di Cassazione*, while still defining the compensation as a 'salary credit', points out that the Italian State could not have vested its own administration with a lesser obligation compared to that identified by the ECJ and resulting from its interpretation of the Directive; in any case, the obligation of the State – despite being indemnifying and non-compensative as provided in the domestic system - cannot be conditioned by faulty breaches of the organ bound to comply; thus, INPS, in charge of the payment, cannot object that it is not guilty for the delay.

Lastly, the *Corte di Cassazione*, in Decision No 6223 of 1998, explicitly admitted the compensative nature of the indemnity in question. It thereby adopted the wording of the above-mentioned Decisions of the Italian Constitutional Court, which, despite using the word 'damage' and/or referring to the indemnifying title of compensation, do not explicitly include such matters in the general clause of illicit acts under Article 2043 of the Italian Civil Code. Besides, following the logic of these Decisions, this was not even necessary, as the Constitutional Court was called to deal precisely with the (non-)legitimacy of such national provisions which have

[27] Corte di Cassazione, Decision No 7770 of 23 August 1996 (op cit note 25); Decision No 8552 of 27 September 1996.

[28] In this sense, also, Corte di Cassazione, Decision No 133 of 9 January 1997; Decision No 511 of 18 January 1997; and Decision No 8739 of 5 October 1996.

[29] Corte di Cassazione, Decision No 6552 (*op cit* note 27).

[30] Corte di Cassazione, Decision No 1366 of 10 February 1998.

characterised the illicit act as an act due to the failure to implement Directive 80/987.

On the other hand, the position taken by the *Corte di Cassazione*, although based on strict respect of systematic concerns, risks producing further interpretation problems; first of all, to adjudicate whether or not the term fixed by the Italian legislator for introducing applications for compensation is adequate.

9 The latest jurisprudence of the ECJ

The ECJ has added some interesting pieces to this mosaic, through other decisions following the *Francovich* judgment.[31] First of all, the Community judges have affirmed that it is within the scope of the national law provisions relating to liability that the State is bound to repair the consequences of the damage it has caused - subject to the fact that, as far as terms are concerned, national legislation concerning compensation of damages must respect the principles of equal and effective protection.

In the assessment of whether the Italian provision of Article 2 (7) D.Lgs. 80/92 respects these principles, the Court abided - strictly - by its own jurisprudence on the matter of division of jurisdiction between the ECJ and the national judge.

Thus, when identifying the subject of who shall be the defendant in a claim for compensation, the ECJ 'raised its hands' declaring that, as the employee's grievances against the legitimation of INPS had been rejected by the national judge, the grievances cannot be taken into account in prejudicial proceedings. Nowadays, the jurisprudence of the *Corte di Cassazione* has also considered the fact that INPS shall be the legitimate defendant as a *jus receptum*.

There are some more precise, although not final, decisions of the ECJ about the adequacy of the yearly term of expiry provided by the above-mentioned national provision. This term is generally considered as expedient to legal certainty and thus not contrary to the principle of effective protection. Answering a specific query by a national judge, the ECJ specified that claims relating to the scope of application of the Directive are, as far as their object is concerned, diverse from claims introduced in view of obtaining compensation. Thus, their procedure

[31] Namely, three judgments of 10 July 1995, issued respectively in Cases C-373/95 *Maso et al v INPS and Repubblica italiana*, ECJ 1997, p. I-4051; C-94/95 and C-95/95 *Bonifaci et al and Berto et al v INPS*, ECR 1997, p. I-3969; and C-261/95 *Palmisani v INPS*, ECR 1997, p. I-4025.

modalities cannot be compared. Indications emerging from judgment No 285 of 1993 of the Constitutional Court[32] appear, therefore, slightly divergent: it is not possible to affirm the 'equal protection' of the respective plaintiffs simply because Article 2 (7) D.Lgs. 80/92 has been devised in such a way as to obtain a result analogous to that guaranteed by the operative functioning of the 'guarantee trust'.

The ECJ has advanced even more stating that, as the national provision aims at the compensation of damages, the control on the equal protection must be exerted with regard to 'the ordinary legal regime of extra-contractual liability'. Just at this crucial point, however, the Court reverted to its initial reluctance to interfere in the qualification of concepts and institutions of national law; and, despite systematically dealing with the nature of compensation in the way provided by domestic law, it deferred to national judges the not easy task of adjudicating whether a claim for compensation of damages, brought by an individual under Article 2043 of the Italian Civil Code, might be addressed against public bodies for any omission or illicit act ascribable to them when exercising their powers. The subsequent move in this sort of chess game will, therefore, belong to the national judge who has introduced the prejudicial question[33] and who, without addressing himself to Rome or Luxembourg again, shall have to clarify whether it is possible under the Italian system to recognise an illicit act of the legislator due to inaction in implementing Community directives and, more generally, due to the legislator's omissions in its exercise of legislative action.

10 What is the follow-up of the Francovich affair?

The *Francovich* judgment has raised many doubts, especially in terms of the question as to whether extra-contractual liability, following the legislative standard of external reference to the general clause of Article 2043 Civil Code, presupposes the injustice of the damage. In this case, such a standard cannot be found in the Community provisions of Articles 10 and 249 (ex Articles 5 and 189) EC, as the violation of these provisions by Member States does not seem to be sufficient to sustain a subjective right of the individual, even if he or she has been damaged by the inaction of the legislator. The doctrinal debate which the *Francovich* affair has opened has not yet brought decisive elements on the issue.

[32] See *supra*, note 13.

[33] Namely, the Judge of labour of first instance of Frosinone (see *supra*, note 13).

Some useful ideas have come from Community jurisprudence, especially from the *Brasserie du Pêcheur* case, where the ECJ, following the conclusions of General Advocate Tesauro, stated that, as soon as Community institutions, by means of their corresponding legislative instruments, create specific obligations for national legislators, the latter no longer act in a completely free way, but must abide by the limits that they have pledged to respect.[34] In the face of the transfer of sovereignty in favour of the Community, the legislator no longer holds - not even internally - any absolute discretionary power, but instead has the specific obligation to legislate in one way rather than in another.

The latest jurisprudence of the *Corte di Cassazione* has adopted these ideas and has evaluated most of them. It remains to be seen at which point these ideas will prove to be persuasive with regard to the subsequent jurisprudence to come.

On the other hand, in its sentences of July 1995,[35] the ECJ has established a kind of 'safety net': if the Italian regime on civil liability cannot provide the grounds for compensation claims against the State, this means that no comparison of 'equal protection' is possible and that, as a consequence, the yearly term of expiry must be considered as compatible with Community rules (it being the only protection that can be experienced). In other words, if it is not possible to foresee an illicit act consisting of a breach of extra-contractual liability due to the omission of the legislator, it might be preferable to acquiesce with the yearly term of expiry (Article 2 (7) D.Lgs. 80/92). This is to say, this provision with the yearly term of expiry is better than nothing.

[34] See, General Advocate Tesauro, ECR 1996, p. I-1029 ff.

[35] See *supra*, note 31.

MONITORING THE ENFORCEMENT OF THE UNFAIR CONTRACT TERMS DIRECTIVE: THE EUROPEAN COMMISSION DATABASE ON CASE LAW ABOUT UNFAIR CONTRACTUAL TERMS (CLAB)

Cosimo Monda*

1 The launch of CLAB

Immediately after the adoption of Directive 93/13 on unfair terms in consumer contracts,[1] the European Commission launched a project developing a Database on Case Law about Unfair Contractual Terms (CLAB). Herewith the Commission intended to create an instrument for monitoring the practical enforcement of the Directive.[2] CLAB should, therefore, create a European public observatory on unfair contract terms to promote the harmonious and consistent enforcement of the Directive in the different Member States. CLAB hence aims to improve the information available to the public concerned: judges, lawyers, consumers, civil servants and academics, whilst it should ameliorate consumer's access to justice, in particular in relation to cross border disputes. Through CLAB, the Commission intends to give a comprehensive and faithful picture of the 'law in action'.

2 Description of CLAB

CLAB consists of a database which is currently accessible to the public via the Internet (http://europa.eu.int/clab/index.htm). It includes information on national 'jurisprudence' on unfair contract terms. The notion of jurisprudence is a very broad one, covering not only court

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[1] Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95/93/p. 29 of 21 April 1993).

[2] In order to prepare its report to the Parliament, see Article 9 of the Directive.

judgments but also decisions by administrative bodies, voluntary agreements, out-of-court judgments and arbitration awards. CLAB covers all EU Member States (plus the EEA members Norway and Iceland) and is continually updated by the Commission services. The database covers national 'jurisprudence' issued both before and after the adoption of the Directive. The former generally is based on other provisions or general legal principles (good faith, equity, abuse of rights, etc) which have an unfair terms dimension. CLAB mainly focuses on contracts concluded with or offered to consumers. Yet, it also contains certain decisions handed down in disputes between professionals which are of interest for consumer law. This might be explained by the fact that some Member States such as Germany and the Netherlands adhere to a broad scope of application of unfair contract terms, extending it also to relations between firms.

In order to collect and analyse all existing case law in the field of unfair terms, the European Commission has created a network of national contractors, who were selected on the basis of an open invitation to tender. The gathering and analysis of the jurisprudence is based on a typological classification, distinguishing between *inter alia* the nature and type of decision, type of action, type of contract, type of term, names of the decision-making body and of the parties and the economic sector. With the help of the necessary software for the creation of standardised jurisprudence files (EDUT), national contractors have drafted and encoded cards with information on the unfair contract terms in the national systems in accordance with the typology alluded to above. These cards have been transmitted to the Commission. The Commission, in turn, has carried out a quality control of the cards, checking among others their legal contents, the manner in which they are drafted and whether they adhere to the criteria set. Subsequently, the Commission may accept or reject the cards or impose modifications, after which the data is inserted into the CLAB database (see Figure 1). At present, CLAB contains 7.649 files. Each file contains a decision on a contractual term whose fairness has been disputed, regardless of whether it has been declared unfair or not. In this way, one and the same decision may give rise to several files. Hence, it should be underlined that it is the contractual term, and not the judgment or decision, that is the principal 'actor' of the database. Each file is drafted in its original language. However, the text of the contractual term and the commentary on the decision are translated into French and English. One can query the database only in English in accordance with the above mentioned typology.

3 The operation of CLAB in practice

Very recently, the Commission presented its Report on the Implementation of the Unfair Contract Terms Directive.[3] In this Report the Commission draws on the statistics obtained by means of the CLAB database. CLAB has thus contributed to disclosing information as to the use and application of unfair contract terms in national jurisprudence. For instance, CLAB has been useful in identifying the problematic applicability of the unfair contract terms which are indicatively listed in the Directive are in practice problematic to apply as many of the terms are vaguely worded so that one single term in the list may relate to a large number of different contractual terms. A total of 4,497 cases concern the 17 points mentioned in the list as annexed to the Directive. One third of the cases contained in CLAB which relate to this list, exclusively concern point (b) of the list (exclusion or limitation of the consumer's legal rights in the event of non performance on the part of the professional) (approximately 1,450 cases).[4] This is followed by litigation on point (i) (binding the consumer to terms that were not communicated to him/her before conclusion of the contract) (approximately 770 cases), point (e) (imposition of disproportionate penalties if the consumer fails to perform) (approximately 650 cases) and point (q) (excluding or hindering the consumer's right to take legal action or exercise any other legal remedy) (approximately 620 cases). In addition, on the basis of CLAB it may be concluded that the role of the 'black list' in assessing the unfairness of a term is highly important for the courts. Out of a total of 1,849 cases that refer to national lists of terms, 1,689 concern binding (black) lists while only 160 relate to non-binding (grey) lists. CLAB has also revealed that collective agreements may have an impact on unfair contract terms and the number of judgments on these. It shows that following negotiations in the individual sectors, the number of judgment handed down in Sweden by the courts in the field of unfair terms dropped dramatically.[5] Analysis of CLAB moreover reveals that 4.4 % of the judgments handed down by national courts in the field covered by the Directive refer to the Community text. According to the Commission this reflects

[3] Commission, Report on the Implementation of the Unfair Contract Terms Directive, COM (2000) 248 final of 27 April 2000.

[4] *Ibid*, at p 16. See Graphic 9 as annexed to the Report.

[5] Although such agreements had not much impact in France. Commission Report (see *supra*, note 3), at p. 25.

a progressive impact of Community law on national law as national courts appear to become more sensitive to European law.[6]

CLAB moreover provides details as to the type of action and the type of contractual terms which are considered as unfair. As regards the action, 45% of the cases inserted in CLAB concerns individuals suits, whilst 54% sees to preventive measures, such as actions for injunctions, recommendations and self-regulatory systems which intend to eliminate unfair contract terms, 1% concerns a joint action.[7] Importantly, in 76% of the decisions contract terms are judged to be unfair.[8] 44% of the contracts in which unfair contract terms are concluded, concerns services not relating to goods (banking, insurance, credit, transport, etc) and 16 % concerns services relating to goods (repair, installation, maintenance, guarantees, etc).[9] Out of a total of 8,858 terms, 2,443 concern obligations imposed by the professional on the consumer,[10] 1,380 terms relate to the waiving and limitation of the professional's liability, 1,133 terms concern the presentation of general terms and conditions and their enforceability by the consumer, 787 terms see to the price and its payment, 787 terms concern the termination of the contract, 744 terms relate to procedures performance of the professional's obligations, 694 terms concern access to justice, 177 terms relate to the interpretation and changes to the contract, whilst 69 terms see to attempts to circumvent the law.[11] It appears that the real state and financial sectors generate the most 'jurisprudence' as regards unfair terms.

4 The future of CLAB: to be or not to be?

CLAB *inter alia* served the Commission's purposes to monitor the implementation of Directive 93/13/EEC and to enable the Commission to report on this to the European Parliament and the Council. Hence, Article 9 of the Directive obliged the Commission to present such a

[6] *Ibid*, at p. 32.

[7] *Ibid*, Graphic 2 as annexed to the Report.

[8] *Ibid*, Graphic 3 as annexed to the Report.

[9] *Ibid*, Graphic 4 as annexed to the Report.

[10] Of which 1,003 terms concern exclusion or limitations rights, 582 terms relate to penalty clauses, 296 terms prescribe special charges, 228 terms concern warranties, whilst 91 terms relate to notification procedures imposed on the consumer in cases where the good is not in conformity with the contract.

[11] *Ibid*, Graphic 10 as annexed to the Report.

report after five years of the entry into force of the Directive. Therefore, the CLAB project was initially launched for a period of five years. As mentioned above, the Commission has presented recently its Report on the implementation of Directive 93/13/EEC, drawing on the data provided by CLAB and the five year period has expired. The question arises, therefore, whether the CLAB should continue to exist. In its Report, the Commission reflects upon the future of CLAB and wonders whether this project should be continued and if so, what amendments are necessary.[12] It appears however difficult to judge whether the CLAB project should be continued as information on the use of CLAB lacks strikingly. Although the Commission's Report reveals a great deal of valuable information as to the structure of the database and the information on the national 'jurisprudence' on unfair contract terms (the 'law in action'), the Report is disappointing in that no information and statistics are revealed on how, when and by whom the CLAB database is used apart from the Commission itself (for its monitoring purposes).

The question whether or not CLAB should be continued depends therefore, in my view, on the purposes that CLAB should serve. Should CLAB serve solely the Commission's purposes to monitor the application of Unfair Contract Terms Directive (with the issuance of the Commission's Report this may have become superfluous) or should it serve to inform public authorities and courts (e.g., also the European Court of Justice), private organisations and individuals, and ameliorate consumer's access to justice as originally envisaged? Therefore, a statistical analysis should first be carried out as to the profile of CLAB's users, their view on the usefulness of CLAB, their satisfaction with the operation of CLAB in terms of user friendliness as well as CLAB's potential to ameliorate consumer access to justice in practice. Only on the basis of such an analysis it can be judged whether and in which form CLAB should be continuated, developing a more conceptual approach to the use of CLAB. It is evident that the Commission wants to share or discharge the costs of CLAB, which until now it has entirely financed by itself. The Commission thus considers the possibility to create a partnership with the Member States or with certain institutions or non-profit associations in which the partners could assume responsibility for assembling the jurisprudence and preparing the files, while the Commission would be responsible for the technical management and translation of the files.[13] In

[12] *Ibid*, question 21.

[13] *Ibid*.

addition, the Commission wonders whether users should be charged for accessing CLAB, in order to finance and develop the database.[14] These questions should be answered in the light of the analysis which needs to be carried out, bearing in mind that payment for the use of CLAB by consumers themselves or non-profit organisations would prevent and discourage the use of CLAB by these users. Hereby it should be emphasised that the virtual formula provided by CLAB to investigate unfair contract terms in the 'jurisprudence' of all national systems may be an important instrument in today's Information Society and constitutes an important method to inform public authorities, private organisations and individuals and enhance transparency in this area

[14] *Ibid*, question 22.

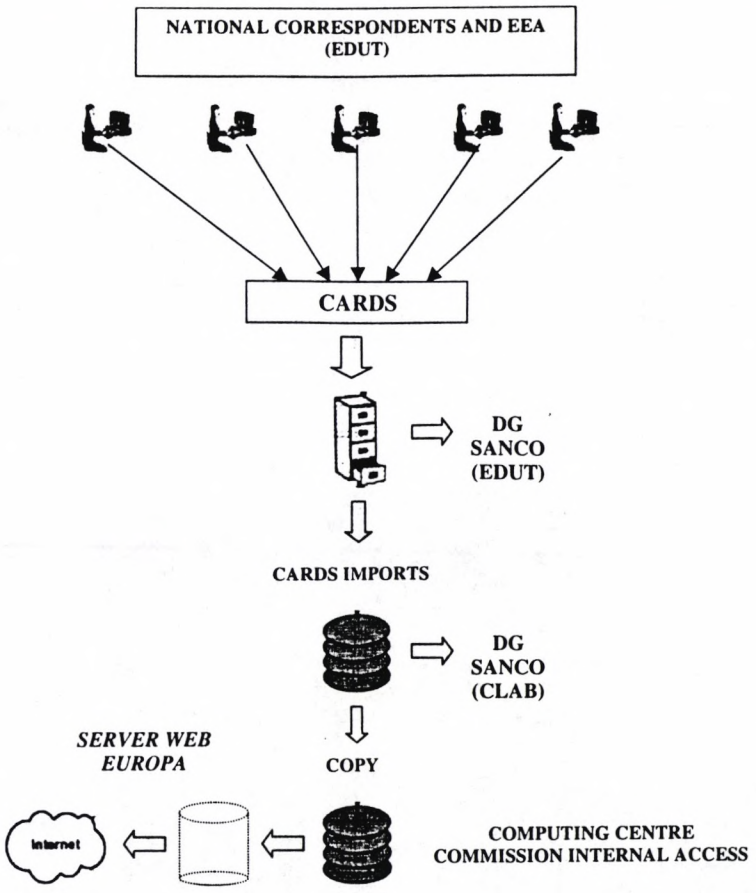

Figure 1. *Overview of the CLAB Network, based on European Commission figures (DG Health and Consumer Protection: DG SANCO).*

APPENDIX: MATERIALS

1 Italian Civil Code (Codice Civile, Articoli 2195, 2597 e 2598)

Art. 2195: *(Imprenditori soggetti a registrazione).* Sono soggetti all'obbligo dell'iscrizione nel registro delle imprese (2188) gli imprenditori che esercitano: 1) un'attività industriale diretta alla produzione di beni o di servizi (2135); 2) un'attività intermediaria nella circolazione dei beni; 3) un'attività di trasporto per terra, per acqua o per aria (1678); 4) un'attività bancaria (1834 ss.) o assicurativa (1882); 5) altre attività ausiliari delle precedenti (1754).
Le disposizioni della legge che fanno riferimento alle attività e alle imprese commerciali si applicano, se non risulta diversamente, a tutte le attività indicate in questo articolo e alle imprese che le esercitano (371, 397, 425, 2201).

Art. 2597: *(Obbligo di contrattare nel caso di monopolio).* Chi esercita un'impresa (2082) in condizione di monopolio legale ha l'obbligo di contrattare (1032, 2932) con chiunque richieda le prestazioni che formano oggetto dell'impresa, osservando la parità di trattamento (3 Cost.; 1679, 1680).

Art. 2598: *(Atti di concorrenza sleale).* Ferme le disposizioni che concernono la tutela dei segni distintivi (2563 ss., 2592, 2593), compie atti di concorrenza sleale chiunque: 1) usa nomi o segni distintivi idonei a produrre confusione (2564) con i nomi o con i segni distintivi legittimamente usati da altri, o imita servilmente i prodotti di un concorrente, o compie con qualsiasi altro mezzo atti idonei a creare confusione con i prodotti e con l'attività di un concorrente; 2) diffonde notizie e apprezzamenti sui prodotti e sull'attività di un concorrente, idonei a detreminarne il discredito, o si appropria di pregi dei prodotti o dell'impresa di un concorrente; 3) si vale direttamente o indirettamente di ogni altro mezzo non conforme ai principi della correttezza professionale e idoneo a danneggiare l'altrui azienda (1175).

2 Italian Antitrust Law (Legge No 287, 10.10.1990, "Norme per la tutela della concorrenza e del mercato")

TITOLO I: Norme sulle intese, sull'abuso di posizione dominante e sulle operazioni di concentrazione

Art. 1 (Ambito di applicazione e rapporti con l'ordinamento comunitario): 1) Le disposizioni della presente legge in attuazione dell'articolo 41 della Costituzione a tutela e garanzia del diritto di iniziativa economica, si applicano alle intese, agli abusi di posizione dominante e alle concentrazioni di imprese che non ricadono nell'ambito di applicazione degli articoli 65 e/o 66 del Trattato istitutivo della Comunità europea del carbone e dell'acciaio, degli articoli 85 e/o 86 del Trattato istitutivo della Comunità economica europea (CEE), dei regolamenti della CEE o di atti comunitari con efficacia normativa equiparata. 2) L'Autorità garante della concorrenza e del mercato di cui all'articolo 10, di seguito denominata Autorità, qualora ritenga che una fattispecie al suo esame non rientri nell'ambito di applicazione della presente legge ai sensi del comma 1, ne informa la Commissione delle Comunità europee, cui trasmette tutte le informazioni in suo possesso. 3) Per le fattispecie in relazione alle quali risulti già iniziata una procedura presso la Commissione delle Comunità europee in base alle norme richiamate nel comma 1, l'Autorità sospende l'istruttoria, salvo che per gli eventuali aspetti di esclusiva rilevanza nazionale. 4) L'interpretazione delle norme contenute nel presente titolo è effettuata in base ai principi dell'ordinamento delle Comunità europee in materia di disciplina della concorrenza.

Art. 2 (Intese restrittive della libertà di concorrenza): 1) Sono considerati intese gli accordi e/o le pratiche concordati tra imprese nonché le deliberazioni, anche se adottate ai sensi di disposizioni statutarie o regolamentari, di consorzi, associazioni di imprese ed altri organismi similari. 2) Sono vietate le intese tra imprese che abbiano per oggetto o per effetto di impedire, restringere o falsare in maniera consistente il gioco della concorrenza all'interno del mercato nazionale o in una sua parte rilevante, anche attraverso attività consistenti nel: a)fissare direttamente o indirettamente i prezzi d'acquisto o di vendita ovvero altre condizioni contrattuali; b) impedire o limitare la produzione, gli sbocchi, o gli accessi al mercato, gli investimenti, lo sviluppo tecnico o il progresso tecnologico; c)

ripartire i mercati o le fonti di approvvigionamento; c) applicare, nei rapporti commerciali con altri contraenti, condizioni oggettivamente diverse per prestazioni equivalenti, così da determinare per essi ingiustificati svantaggi nella concorrenza; e) subordinare la conclusione di contratti all'accettazione da parte degli altri contraenti di prestazioni supplementari che, per loro natura o secondo gli usi commerciali, non abbiano alcun rapporto con l'oggetto dei contratti stessi. 3) Le intese vietate sono nulle ad ogni effetto.

Art. 3 (Abuso di posizione dominante): 1) È vietato l'abuso da parte di una o più imprese di una posizione dominante all'interno del mercato nazionale o in una sua parte rilevante, ed inoltre è vietato: a) imporre direttamente o indirettamente prezzi di acquisto, di vendita o altre condizioni contrattuali ingiustificatamente gravose; b) impedire o limitare la produzione, gli sbocchi o gli accessi al mercato, lo sviluppo tecnico o il progresso tecnologico, a danno dei consumatori; c) applicare nei rapporti commerciali con altri contraenti condizioni oggettivamente diverse per restazioni equivalenti, così da determinare per essi ingiustificati svantaggi nella concorrenza; d) subordinare la conclusione dei contratti all'accettazione da parte degli altri contraenti di prestazioni supplementari che, per loro natura e secondo gli usi commerciali, non abbiano alcuna connessione con l'oggetto dei contratti stessi.

Art. 4 (Deroghe al divieto di intese restrittive della libertà di concorrenza): 1) L'Autorità può autorizzare, con proprio provvedimento, per un periodo limitato, intese o categorie di intese vietate ai sensi dell'articolo 2, che diano luogo a miglioramenti nelle condizioni di offerta sul mercato i quali abbiano effetti tali da comportare un sostanziale beneficio per i consumatori e che siano individuati anche tenendo conto della necessità di assicurare alle imprese la necessaria concorrenzialità sul piano internazionale e connessi in particolare con l'aumento della produzione, o con il miglioramento qualitativo della produzione stessa o della distribuzione ovvero con il progresso tecnico o tecnologico. L'autorizzazione non può comunque consentire restrizioni non strettamente necessarie al raggiungimento delle finalità di cui al presente comma né può consentire che risulti eliminata la concorrenza da una parte sostanziale del mercato. 2) L'Autorità può revocare il provvedimento di autorizzazione in deroga di cui al comma 1, previa diffida, qualora l'interessato abusi dell'autorizzazione ovvero quando venga meno alcuno dei presupposti per l'autorizzazione. 3) La richiesta di autorizzazione è presentata all'Autorità, che si avvale dei poteri di istruttoria di cui all'articolo 14 e provvede entro centoventi giorni dalla presentazione della richiesta stessa.

Art. 5 (Operazioni di concentrazione): 1) L'operazione di concentrazione si realizza: a) quando due o più imprese procedono a fusione; b) quando uno o più soggetti in posizione di controllo di almeno un'impresa ovvero una o più imprese acquisiscono direttamente od indirettamente, sia mediante acquisto di azioni o di elementi del patrimonio, sia mediante contratto o qualsiasi altro mezzo, il controllo dell'insieme o di parti di una o più imprese; c) quando due o più imprese procedono, attraverso la costituzione di una nuova società, alla costituzione di un'impresa comune. 2) L'assunzione del controllo di un'impresa non si verifica nel caso in cui una banca o un istituto finanziario acquisti, all'atto della costituzione di un'impresa o dell'aumento del suo capitale, partecipazioni in tale impresa al fine di rivenderle sul mercato, a condizione che durante il periodo di possesso di dette partecipazioni, comunque non superiore a ventiquattro mesi, non eserciti i diritti di voto inerenti alle partecipazioni stesse. 3) Le operazioni aventi quale oggetto o effetto principale il coordinamento del comportamento di imprese indipendenti non danno luogo ad una concentrazione.

Art. 6 (Divieto delle operazioni di concentrazione restrittive della libertà di concorrenza): 1) Nei riguardi delle operazioni di concentrazione soggette a comunicazione ai sensi dell'articolo 16, l'Autorità valuta se comportino la costituzione o il rafforzamento di una posizione dominante sul mercato nazionale in modo da eliminare o ridurre in modo sostanziale e durevole la concorrenza. Tale situazione deve essere valutata tenendo conto delle possibilità di scelta dei fornitori e degli utilizzatori, della posizione sul mercato delle imprese interessate, del loro accesso alle fonti di approvvigionamento o agli sbocchi di mercato, della struttura dei mercati, della situazione competitiva dell'industria nazionale, delle barriere all'entrata sul mercato di imprese concorrenti, nonché dell'andamento della domanda e dell'offerta dei prodotti o servizi in questione. 2) L'Autorità, al termine dell'istruttoria di cui all'articolo 16, comma 4, quando accerti che l'operazione comporta le conseguenze di cui al comma 1, vieta la concentrazione ovvero l'autorizza prescrivendo le misure necessarie ad impedire tali conseguenze.

Art. 7 (Controllo): 1) Ai fini del presente titolo si ha controllo nei casi contemplati dall'articolo 2359 del codice civile ed inoltre in presenza di diritti, contratti o altri rapporti giuridici che conferiscono, da soli o congiuntamente, e tenuto conto delle circostanze di fatto e di diritto, la possibilità di esercitare un'influenza determinante sulle attività di un'impresa, anche attraverso: a) diritti di proprietà o di godimento sulla totalità o su parti del patrimonio di un'impresa; b) diritti, contratti o altri rapporti giuridici che conferiscono un'influenza determinante sulla composizione, sulle, deliberazioni o sulle decisioni degli organi di un'impresa. 2) Il controllo è acquisito dalla persona o dalla impresa o dal gruppo di persone o di imprese: a) che siano titolari dei diritti o beneficiari dei contratti o soggetti degli altri rapporti giuridici suddetti; b) che, pur non essendo titolari di tali diritti o beneficiari di tali contratti o soggetti di tali rapporti giuridici, abbiano il potere di esercitare i diritti che ne derivano.

Art. 8 (Imprese pubbliche e in monopolio legale): 1) Le disposizioni contenute nei precedenti articoli si applicano sia alle imprese private che a quelle pubbliche o a prevalente partecipazione statale. 2) Le disposizioni di cui ai precedenti articoli non si applicano alle imprese che, per disposizioni di legge, esercitano la gestione di servizi di interesse economico generale ovvero operano in regime di monopolio sul mercato, per tutto quanto strettamente connesso all'adempimento degli specifici compiti loro affidati.

Art. 9 (Autoproduzione): 1) La riserva per legge allo Stato ovvero a un ente pubblico del monopolio su un mercato, nonché la riserva per legge ad un'impresa incaricata della gestione di attività di prestazione al pubblico di beni o di servizi contro corrispettivo, non comporta per i terzi il divieto di produzione di tali beni o servizi per uso proprio, della società controllante e delle società controllate. 2) L'autoproduzione non è consentita nei casi in cui in base alle disposizioni che prevedono la riserva risulti che la stessa è stabilita per motivi di ordine pubblico, sicurezza pubblica e difesa nazionale, nonché, salvo concessione, per quanto concerne il settore delle telecomunicazioni.

TITOLO II: Istituzione e compiti dell'Autorità garante della concorrenza e del mercato

Capo I: Istituzione dell'Autorità

Art. 10 (Autorità garante della concorrenza e del mercato): 1) È istituita l'Autorità garante della concorrenza e del mercato, denominata ai fini della presente legge Autorità, con sede in Roma. 2) L'Autorità opera in piena autonomia e con indipendenza di giudizio e di valutazione ed è organo collegiale costituito dal presidente e da quattro membri, nominati con determinazione adottata d'intesa dai Presidenti della Camera dei deputati e del Senato della Repubblica. Il presidente è scelto tra persone di notoria indipendenza che abbiano ricoperto incarichi istituzionali di grande responsabilità e rilievo. I quattro membri sono scelti tra persone di notoria indipendenza da individuarsi tra magistrati del Consiglio di Stato, della Corte dei conti o della Corte di cassazione, professori universitari ordinari di materie economiche o giuridiche, e personalità provenienti da settori economici dotate di alta e riconosciuta professionalità. 3) I membri dell'Autorità sono nominati per sette anni e non possono essere confermati. Essi non possono esercitare, a pena di decadenza, alcuna attività professionale o di consulenza, né possono essere amministratori o dipendenti di enti pubblici o privati, né ricoprire altri uffici pubblici di qualsiasi natura. I dipendenti statali sono collocati fuori ruolo per l'intera durata del mandato. 4) L'Autorità ha diritto di corrispondere con tutte le pubbliche amministrazioni e con gli enti di diritto pubblico, e di chiedere ad essi, oltre a notizie ed informazioni, la collaborazione per l'adempimento delle sue funzioni. L'Autorità, in quanto autorità nazionale competente per la tutela della concorrenza e del mercato, intrattiene con gli organi delle Comunità europee i rapporti previsti dalla normativa comunitaria in materia. 5) Entro novanta giorni dalla data di entrata in vigore della presente legge, con decreto del Presidente della Repubblica, su proposta del Ministro dell'industria, del commercio e dell'artigianato, sentito il Ministro del tesoro, previa deliberazione del Consiglio dei Ministri, sono stabilite procedure istruttorie che garantiscono agli interessati la piena conoscenza degli atti istruttori, il contraddittorio e la verbalizzazione. 6) L'Autorità delibera le norme concernenti la propria organizzazione e il proprio funzionamento, quelle concernenti il trattamento giuridico ed economico del personale e l'ordinamento delle carriere, nonché quelle dirette a disciplinare la gestione delle spese nei limiti previsti dalla presente legge, anche in deroga alle disposizioni sulla contabilità generale dello Stato. 7) L'Autorità provvede all'autonoma gestione delle spese per il proprio funzionamento nei limiti del fondo stanziato a tale scopo nel bilancio dello Stato e iscritto, con unico capitolo, nello stato di previsione della spesa del Ministero dell'industria, del commercio e dell'artigianato. La gestione finanziaria si svolge in base al bilancio di previsione approvato dall'Autorità entro il 31 dicembre dell'anno precedente a quello cui il bilancio si riferisce. Il contenuto e la struttura del bilancio di previsione, il quale deve comunque contenere le spese indicate entro i limiti delle entrate previste, sono stabiliti dal regolamento di cui al comma 6, che disciplina anche le modalità per le eventuali variazioni. Il rendiconto della gestione finanziaria, approvato entro il 30 aprile dell'anno successivo, è soggetto al controllo della Corte dei conti. Il bilancio preventivo e il rendiconto della gestione finanziaria sono pubblicati nella Gazzetta Ufficiale della Repubblica italiana. 8) Con decreto del Presidente del Consiglio dei Ministri, su proposta del Ministro dell'industria, del commercio e dell'artigianato, d'intesa con il Ministro del tesoro, sono determinate le indennità spettanti al presidente e ai membri dell'Autorità.

Art. 11 (Personale della Autorità): 1) Con decreto del Presidente del Consiglio dei Ministri è istituito un apposito ruolo del personale dipendente dell'Autorità. Il numero dei posti previsti dalla pianta organica non può eccedere le centocinquanta unità. L'assunzione del personale avviene per pubblico concorso ad eccezione delle categorie per le quali sono previste assunzioni in base all'articolo 16 della legge 28 febbraio 1987, n. 56. 2) Il trattamento giuridico ed economico del personale e l'ordinamento delle carriere sono stabiliti in base ai criteri fissati dal contratto collettivo di lavoro in vigore per la Banca d'Italia, tenuto conto delle specifiche esigenze funzionali ed organizzative dell'Autorità. 3) Al personale in servizio presso l'Autorità è in ogni caso fatto divieto di assumere altro impiego o

incarico o esercitare attività professionali, commerciali e industriali. 4) L'Autorità non può assumere direttamente dipendenti con contratto a tempo determinato, disciplinato dalle norme di diritto privato, in numero di cinquanta unità. L'Autorità può inoltre avvalersi, quando necessario, di esperti da consultare su specifici temi e problemi. 5) Al funzionamento dei servizi e degli uffici dell'Autorità sovraintende il segretario generale, che ne risponde al presidente, e che è nominato dal Ministro dell'industria, del commercio e dell'artigianato, su proposta del presidente dell'Autorità.

Capo II: Poteri dell'Autorità in materia di intese restrittive della libertà di concorrenza e di abuso di posizione dominante

Art. 12 (Poteri di indagine): 1) L'Autorità, valutati gli elementi comunque in suo possesso e quelli portati a sua conoscenza da pubbliche amministrazioni o da chiunque vi abbia interesse, ivi comprese le associazioni rappresentative dei consumatori, procede ad istruttoria per verificare l'esistenza di infrazioni ai divieti stabiliti negli articoli 2 e 3. 2) L'Autorità può, inoltre, procedere, d'ufficio o su richiesta del Ministro dell'industria, del commercio e dell'artigianato o del Ministro delle partecipazioni statali, ad indagini conoscitive di natura generale nei settori economici nei quali l'evoluzione degli scambi, il comportamento dei prezzi, o altre circostanze facciano presumere che la concorrenza sia impedita, ristretta o falsata.

Art. 13 (Comunicazione delle intese): Le imprese possono comunicare all'Autorità le intese intercorse. Se l'Autorità non avvia l'istruttoria di cui all'articolo 14 entro centoventi giorni dalla comunicazione non può più procedere a detta istruttoria, fatto salvo, il caso di comunicazioni incomplete o non veritiere.

Art. 14 (Istruttoria): 1) L'Autorità, nei casi di presunta infrazione agli articoli 2 o 3, notifica l'apertura dell'istruttoria alle imprese e agli enti interessati. I titolari o legali rappresentanti delle imprese ed enti hanno diritto di essere sentiti, personalmente o a mezzo di procuratore speciale, nel termine fissato contestualmente alla notifica ed hanno facoltà di presentare deduzioni e pareri in ogni stadio dell'istruttoria, nonché di essere nuovamente sentiti prima della chiusura di questa. 2) L'Autorità può in ogni momento dell'istruttoria richiedere alle imprese, enti o persone che ne siano in possesso, di fornire informazioni e di esibire documenti utili ai fini dell'istruttoria; disporre ispezioni al fine di controllare i documenti aziendali e di prenderne copia, anche avvalendosi della collaborazione di altri organi dello Stato; disporre perizie e analisi economiche e statistiche nonché la consultazione di esperti in ordine a qualsiasi elemento rilevante ai fini dell'istruttoria. 3) Tutte le notizie, le informazioni o i dati riguardanti le imprese oggetto di istruttoria da parte dell'Autorità sono tutelati dal segreto d'ufficio anche nei riguardi delle pubbliche amministrazioni. 4) I funzionari dell'Autorità nell'esercizio delle loro funzioni sono pubblici ufficiali. Essi sono vincolati dal segreto d'ufficio. 5) Con provvedimento dell'Autorità, i soggetti richiesti di fornire gli elementi di cui al comma 2 sono sottoposti alla sanzione amministrativa pecuniaria fino a cinquanta milioni di lire se rifiutano od omettono, senza giustificato motivo, di fornire le informazioni o di esibire i documenti ovvero alla sanzione amministrativa pecuniaria fino a cento milioni di lire se forniscono informazioni od esibiscono documenti non veritieri. Sono salve le diverse sanzioni previste dall'ordinamento vigente.

Art. 15 (Diffide e sanzioni): 1) Se a seguito dell'istruttoria di cui all'articolo 14 l'Autorità ravvisa infrazioni agli articoli 2 o 3, fissa alle imprese e agli enti interessati il termine per l'eliminazione delle infrazioni stesse. Nei casi di infrazioni gravi, tenuto conto della gravità e della durata dell'infrazione, dispone inoltre l'applicazione di una sanzione amministrativa pecuniaria in misura non inferiore all'uno per cento e non superiore al dieci per cento del fatturato realizzato in ciascuna impresa o ente nell'ultimo esercizio chiuso anteriormente alla notificazione della diffida relativamente ai prodotti oggetto dell'intesa o dell'abuso di posizione dominante, determinando i termini entro i quali l'impresa deve procedere al pagamento della sanzione. 2) In caso di inottemperanza alla diffida di cui al comma 1, l'Autorità applica la sanzione amministrativa pecuniaria fino al dieci per cento del fatturato ovvero, nei casi in cui sia stata applicata la sanzione di cui al comma 1, di importo minimo non inferiore al doppio della sanzione già applicata con un limite massimo del dieci per cento del fatturato come individuato al comma 1, determinando altresì il termine entro il quale il pagamento della sanzione deve essere effettuato. Nei casi di reiterata inottemperanza l'Autorità può disporre la sospensione dell'attività d'impresa fino a trenta giorni.

Capo III: Poteri dell'Autorità in materia di divieto delle operazioni di concentrazione

Art. 16 (Comunicazione delle concentrazioni): 1) Le operazioni di concentrazione di cui all'articolo 5 devono essere preventivamente comunicate all'Autorità qualora il fatturato totale realizzato a livello nazionale dall'insieme delle imprese interessate sia superiore a cinquecento miliardi di lire, ovvero qualora il fatturato totale realizzato a livello nazionale dall'impresa di cui è prevista l'acquisizione sia superiore a cinquanta miliardi di lire. Tali valori

sono incrementati ogni anno di un ammontare equivalente all'aumento dell'indice del deflattore dei prezzi del prodotto interno lordo. 2) Per gli istituti bancari e finanziari il fatturato è considerato pari al valore di un decimo del totale dell'attivo dello stato patrimoniale, esclusi i conti d'ordine, e per le compagnie di assicurazione pari al valore dei premi incassati. 3) Entro cinque giorni dalla comunicazione di una operazione di concentrazione l'Autorità ne dà notizia al Presidente del Consiglio dei Ministri ed al Ministro dell'industria, del commercio e dell'artigianato. 4) Se l'Autorità ritiene che un'operazione di concentrazione sia suscettibile di essere vietata ai sensi dell'articolo 6, avvia entro trenta giorni dal ricevimento della notifica, o dal momento in cui ne abbia comunque avuto conoscenza, l'istruttoria attenendosi alle norme dell'articolo 14. L'Autorità, a fronte di un'operazione di concentrazione ritualmente comunicata, qualora non ritenga necessario avviare l'istruttoria deve dare comunicazione alle imprese interessate ed al Ministro dell'industria, del commercio e dell'artigianato delle proprie conclusioni nel merito, entro trenta giorni dal ricevimento della notifica. 5) L'offerta pubblica di acquisto che possa dar luogo ad operazioni di concentrazione soggetta alla comunicazione di cui al comma 1 deve essere comunicata all'Autorità contestualmente alla sua comunicazione alla Commissione nazionale per le società e la borsa. 6) Nel caso di offerta pubblica di acquisto comunicata all'Autorità ai sensi del comma 5, l'Autorità deve notificare l'avvio dell'istruttoria entro quindici giorni dal ricevimento della comunicazione e contestualmente darne comunicazione alla Commissione nazionale per le società e la borsa. 7) L'Autorità può avviare l'istruttoria dopo la scadenza dei termini di cui al presente articolo, nel caso in cui le informazioni fornite dalle imprese con la comunicazione risultino gravemente inesatte, incomplete o non veritiere. 8) L'Autorità, entro il termine perentorio di quarantacinque giorni dall'inizio dell'istruttoria di cui al presente articolo, deve dare comunicazione alle imprese interessate ed al Ministro dell'industria, del commercio e dell'artigianato, delle proprie conclusioni nel merito. Tale termine può essere prorogato nel corso dell'istruttoria per un periodo non superiore a trenta giorni, qualora le imprese non forniscano informazioni e dati a loro richiesti che siano nella loro disponibilità.

Art. 17 (Sospensione temporanea dell'operazione di concentrazione): 1) L'Autorità, nel far luogo all'istruttoria di cui all'articolo 16, può ordinare alle imprese interessate di sospendere la realizzazione della concentrazione fino alla conclusione dell'istruttoria. 2) La disposizione del comma 1 non impedisce la realizzazione di un'offerta pubblica di acquisto che sia stata comunicata all'Autorità ai sensi dell'articolo 16, comma 5, sempre che l'acquirente non eserciti i diritti di voto inerenti ai titoli in questione.

Art. 18 (Conclusione dell'istruttoria sulle concentrazioni): 1) L'Autorità, se in esito all'istruttoria di cui all'articolo 16 accerta che una concentrazione rientra tra quelle contemplate dall'articolo 6, ne vieta l'esecuzione. 2) L'Autorità, ove nel corso dell'istruttoria non emergano elementi tali da consentire un intervento nei confronti di un'operazione di concentrazione, provvede a chiudere l'istruttoria, e deve dare immediata comunicazione alle imprese interessate ed al Ministro dell'industria, del commercio e dell'artigianato delle proprie conclusioni in merito. Tale provvedimento può essere adottato a richiesta delle imprese interessate che comprovino di avere eliminato dall'originario progetto di concentrazione gli elementi eventualmente distorsivi della concorrenza. 3) L'Autorità, se l'operazione di concentrazione è già stata realizzata, può prescrivere le misure necessarie a ripristinare condizioni di concorrenza effettiva, eliminando gli effetti distorsivi.

Art. 19 (Sanzioni amministrative pecuniarie per inottemperanza al divieto di concentrazione o all'obbligo di notifica): 1) Qualora le imprese realizzino un'operazione di concentrazione in violazione del divieto di cui all'articolo 18, comma 1, o non ottemperino alle prescrizioni di cui al comma 3 del medesimo articolo, l'Autorità infligge sanzioni amministrative pecuniarie non inferiori all'uno per cento e non superiore al dieci per cento del fatturato delle attività di impresa oggetto della concentrazione. 2) Nel caso di imprese che non abbiano ottemperato agli obblighi di comunicazione preventiva di cui al comma 1 dell'articolo 16, l'Autorità può infliggere alle imprese stesse sanzioni amministrative pecuniarie fino all'uno per cento del fatturato dell'anno precedente a quello in cui è efettuata la contestazione in aggiunta alle sanzioni eventualmente applicabili in base a quanto previsto dal comma 1, a seguito delle conclusioni dell'istruttoria prevista dal presente capo III, il cui inizio decorre dalla data di notifica della sanzione di cui al presente comma.

Capo IV: Disposizioni speciali

Art. 20 (Aziende ed istituti di credito, imprese assicurative e dei settori della radiodiffusione e dell'editoria): 1) Comma abolita; 2) Nei confronti delle aziende ed istituti di credito l'applicazione degli articoli 2, 3, 4 e 6 spetta alla competente autorità di vigilanza. 3) I provvedimenti delle autorità di vigilanza di cui ai commi 1 e 2, in applicazione degli articoli 2, 3, 4 e 6, sono adottati sentito il parere dell'Autorità garante della concorrenza e del mercato di cui all'articolo 10, che si pronuncia entro trenta giorni dal ricevimento della documentazione posta a fondamento del provvedimento. Decorso inutilmente tale termine l'autorità di vigilanza può adottare il

provvedimento di sua competenza. 4) Nel caso di operazioni che coinvolgono imprese assicurative, i provvedimenti dell'Autorità di cui all'articolo 10 sono adottati sentito il parere dell'Istituto per la vigilanza sulle assicurazioni private e d'interesse collettivo (ISVAP), che si pronuncia entro trenta giorni dal ricevimento della documentazione posta a fondamento del provvedimento. Decorso inutilmente tale termine l'Autorità di cui all'articolo 10 può adottare il provvedimento di sua competenza. 5) L'Autorità di vigilanza sulle aziende ed istituti di credito può altresì autorizzare, per un tempo limitato, intese in deroga al divieto dell'articolo 2 per esigenze di stabilità del sistema monetario, tenendo conto dei criteri di cui all'articolo 4, comma 1. Detta autorizzazione è adottata d'intesa con l'Autorità di cui all'articolo 10 che valuta se l'intesa comporti o meno l'eliminazione della concorrenza. 5) L'Autorità di cui all'articolo 10 può segnalare alle autorità di vigilanza di cui ai commi 1 e 2 la sussistenza di ipotesi di violazione degli articoli 2 e 3. 6) Fatto salvo quanto disposto nei commi precedenti, allorché l'intesa, l'abuso di posizione dominante o la concentrazione riguardano imprese operanti in settori sottoposti alla vigilanza di più autorità, ciascuna di esse può adottare i provvedimenti di propria competenza. 7) Le autorità di vigilanza di cui al presente articolo operano secondo le procedure previste per l'Autorità di cui all'articolo 10. 8) Le disposizioni della presente legge in materia di concentrazione non costituiscono deroga alle norme vigenti nei settori bancario, assicurativo, della radiodiffusione e dell'editoria.

TITOLO III Poteri conoscitivi e consultivi dell'autorità

Art. 21 (Potere di segnalazione al Parlamento ed al Governo): 1) Allo scopo di contribuire ad una più completa tutela della concorrenza e del mercato, l'Autorità individua i casi di particolare rilevanza nei quali norme di legge o di regolamento o provvedimenti amministrativi di carattere generale determinano distorsioni della concorrenza o del corretto funzionamento del mercato che non siano giustificate da esigenze di interesse generale. 2) L'Autorità segnala le situazioni distorsive derivanti da provvedimenti legislativi al Parlamento e al Presidente del Consiglio dei Ministri e, negli altri casi, al Presidente del Consiglio dei Ministri, ai Ministri competenti e agli enti locali e territoriali interessati. 3) L'Autorità, ove ne ravvisi l'opportunità, esprime parere circa le iniziative necessarie per rimuovere o prevenire le distorsioni e può pubblicare le segnalazioni ed i pareri nei modi più congrui in relazione alla natura e all'importanza delle situazioni distorsive.

Art. 22 (Attività consultiva): 1) L'Autorità può esprimere pareri sulle iniziative legislative o regolamentari e sui problemi riguardanti la concorrenza ed il mercato quando lo ritenga opportuno, o su richiesta di amministrazioni ed enti pubblici interessati. Il Presidente del Consiglio dei Ministri può chiedere il parere dell'Autorità sulle iniziative legislative o regolamentari che abbiano direttamente per effetto: a) di sottomettere l'esercizio di una attività o l'accesso ad un mercato a restrizioni quantitative; b) di stabilire diritti esclusivi in certe aree; c) di imporre pratiche generalizzate in materia di prezzi e di condizioni di vendita.

Art. 23 (Relazione annuale): L'Autorità presenta al Presidente del Consiglio dei Ministri, entro il 30 aprile di ogni anno, una relazione sull'attività svolta nell'anno precedente. Il Presidente del Consiglio dei Ministri trasmette entro trenta giorni la relazione al Parlamento.

Art. 24 (Relazione al Governo su alcuni settori): L'Autorità, sentite le amministrazioni interessate, entro diciotto mesi dalla sua costituzione presenta al Presidente del Consiglio dei Ministri un rapporto circa le azioni da promuovere per adeguare ai principi della concorrenza la normativa relativa ai settori degli appalti pubblici, delle imprese concessionarie e della distribuzione commerciale.

TITOLO IV: Norme sui poteri del Governo in materia di operazioni di concentrazione

Art. 25 (Poteri del Governo in materia di operazioni di concentrazione): 1) Il Consiglio dei Ministri, su proposta del Ministro dell'industria, del commercio e dell'artigianato, determina in linea generale e preventiva i criteri sulla base dei quali l'Autorità può eccezionalmente autorizzare, per rilevanti interessi generali dell'economia nazionale nell'ambito dell'integrazione europea, operazioni di concentrazione vietate ai sensi dell'articolo 6, sempreché esse non comportino la eliminazione della concorrenza dal mercato o restrizioni alla concorrenza non strettamente giustificate dagli interessi generali predetti. In tali casi l'Autorità prescrive comunque le misure necessarie per il ristabilimento di condizioni di piena concorrenza entro un termine prefissato. 2) Nel caso delle operazioni di cui all'articolo 16 alle quali partecipano enti o imprese di Stati che non tutelano l'indipendenza degli enti o delle imprese con norme di effetto equivalente a quello dei precedenti titoli o applicano disposizioni discriminatorie o impongono clausole aventi effetti analoghi nei confronti di acquisizioni da parte di imprese o enti italiani, il Presidente del Consiglio dei Ministri, previa deliberazione del Consiglio dei Ministri, su proposta del Ministro dell'industria, del

commercio e dell'artigianato, può, entro trenta giorni dalla comunicazione di cui all'articolo 16, comma 3, vietare l'operazione per ragioni essenziali di economia nazionale.

Art. 26 (Pubblicità delle decisioni): Le decisioni di cui agli articoli 15, 16, 18, 19 e 25 sono pubblicate entro venti giorni in un apposito bollettino, a cura della Presidenza del Consiglio dei Ministri. Nello stesso bollettino sono pubblicate, ove l'Autorità lo ritenga opportuno, le conclusioni delle indagini di cui all'articolo 12, comma 2.

TITOLO V Norme in materia di partecipazione al capitale di enti creditizi (Titolo abrogato)

TITOLO VI Disposizioni finali

Art. 31 (Sanzioni): Per le sanzioni amministrative pecuniarie conseguenti alla violazione della presente legge si osservano, in quanto applicabili, le disposizioni contenute nel capo I, sezioni I e II, della legge 24 novembre 1981, n. 689.

Art. 32 (Copertura finanziaria): All'onere derivante dall'applicazione della presente legge, valutato in lire 20 miliardi per il 1990, lire 32 miliardi per il 1991 e lire 35 miliardi per il 1992, si provvede mediante corrispondente riduzione dello stanziamento iscritto, ai fini del bilancio triennale 1990-1992, al capitolo 6856 dello stato di previsione del Ministero del tesoro per l'anno 1990, all'uopo utilizzando lo specifico accantonamento «Interventi per la tutela della concorrenza e del mercato».

Art. 33 (Competenza giurisdizionale): 1) I ricorsi avverso i provvedimenti amministrativi adottati sulla base delle disposizioni di cui ai titoli dal I al IV della presente legge rientrano nella giurisdizione esclusiva del giudice amministrativo. Essi devono essere proposti davanti al Tribunale amministrativo regionale del Lazio. 2) Le azioni di nullità e di risarcimento del danno, nonché i ricorsi intesi ad ottenere provvedimenti di urgenza in relazione alla violazione delle disposizioni di cui ai titoli dal I al IV sono promossi davanti alla corte d'appello competente per territorio.

Art. 34 (Entrata in vigore): La presente legge entra in vigore il giorno successivo a quello della sua pubblicazione sulla Gazzetta Ufficiale della Repubblica italiana.

3 Italian Consumer Act (Legge No 281, 30 luglio 1998, "Disciplina dei diritti dei consumatori e degli utenti"), Gazz.Uff. 189, 14 agosto 1998

Art. 1 (Finalita' ed oggetto della legge): 1) In conformita' ai principi contenuti nei trattati istitutivi delle Comunita' europee e nel trattato sull'Unione europea nonche' nella normativa comunitaria derivata, sono riconosciuti e garantiti i diritti e gli interessi individuali e collettivi dei consumatori e degli utenti, ne e' promossa la tutela in sede nazionale e locale, anche in forma collettiva e associativa, sono favorite le iniziative rivolte a perseguire tali finalita', anche attraverso la disciplina dei rapporti tra le associazioni dei consumatori e degli utenti e le pubbliche amministrazioni. 2.) Ai consumatori ed agli utenti sono riconosciuti come fondamentali i diritti: a) alla tutela della salute; b) alla sicurezza e alla qualita' dei prodotti e dei servizi; c) ad una adeguata informazione e ad una corretta pubblicita'; d) all'educazione al consumo; e) alla correttezza, trasparenza ed equita' nei rapporti contrattuali concernenti beni e servizi; f) alla promozione e allo sviluppo dell'associazionismo libero, volontario e democratico tra i consumatori e gli utenti; g) all'erogazione di servizi pubblici secondo standard di qualita' e di efficienza.

Art. 2 (Definizioni): 1.) Ai fini della presente legge si intendono per: a) "consumatori e utenti": le persone fisiche che acquistino o utilizzino beni o servizi per scopi non riferibili all'attivita' imprenditoriale e professionale eventualmente svolta; b) "associazioni dei consumatori e degli utenti": le formazioni sociali che abbiano per scopo statutario esclusivo la tutela dei diritti e degli interessi dei consumatori o degli utenti.

Art. 3 (Legittimazione ad agire): 1.) Le associazioni dei consumatori e degli utenti inserite nell'elenco di cui all'articolo 5 sono legittimate ad agire a tutela degli interessi collettivi, richiedendo al giudice competente: a) di inibire gli atti e i comportamenti lesivi degli interessi dei consumatori e degli utenti; b) di adottare le misure idonee a correggere o eliminare gli effetti dannosi delle violazioni accertate; c) di ordinare la pubblicazione del provvedimento su uno o piu' quotidiani a diffusione nazionale oppure locale nei casi in cui la pubblicita' del provvedimento puo' contribuire a correggere o eliminare gli effetti delle violazioni accertate. 2.) Le associazioni di cui al comma 1 possono attivare, prima del ricorso al giudice, la procedura di conciliazione dinanzi alla camera di

commercio, industria, artigianato e agricoltura competente per territorio a norma dell'articolo 2, comma 4, lettera a), della legge 29 dicembre 1993, n. 580. La procedura e', in ogni caso, definita entro sessanta giorni. 3.) Il processo verbale di conciliazione, sottoscritto dalle parti e dal rappresentante della camera di commercio, industria, artigianato e agricoltura, e' depositato per l'omologazione nella cancelleria della pretura del luogo nel quale si e' svolto il procedimento di conciliazione. 4.) Il pretore, accertata la regolarita' formale del processo verbale, lo dichiara esecutivo con decreto. Il verbale di conciliazione omologato costituisce titolo esecutivo. 5.) In ogni caso l'azione di cui al comma 1 puo' essere proposta solo dopo che siano decorsi quindici giorni dalla data in cui le associazioni abbiano richiesto al soggetto da esse ritenuto responsabile, a mezzo lettera raccomandata con avviso di ricevimento, la cessazione del comportamento lesivo degli interessi dei consumatori e degli utenti. 6.) Nei casi in cui ricorrano giusti motivi di urgenza, l'azione inibitoria si svolge a norma degli articoli 669-bis e seguenti del codice di procedura civile. 7.) Fatte salve le norme sulla litispendenza, sulla continenza, sulla connessione e sulla riunione dei procedimenti, le disposizioni di cui al presente articolo non precludono il diritto ad azioni individuali dei consumatori che siano danneggiati dalle medesime violazioni.

Art. 4 (Consiglio nazionale dei consumatori e degli utenti): 1.) E' istituito presso il Ministero dell'industria, del commercio e dell'artigianato, il Consiglio nazionale dei consumatori e degli utenti, di seguito denominato "Consiglio". 2.) Il Consiglio, che si avvale, per le proprie iniziative, della struttura e del personale del Ministero dell'industria, del commercio e dell'artigianato, e' composto dai rappresentanti delle associazioni dei consumatori e degli utenti inserite nell'elenco di cui all'articolo 5 e da un rappresentante delle regioni e delle province autonome designato dalla conferenza dei presidenti delle regioni, e delle province autonome, ed e' presieduto dal Ministro dell'industria, del commercio e dell'artigianato o da un suo delegato. Il Consiglio e' nominato con decreto del Presidente del Consiglio dei Ministri, su proposta del Ministro dell'industria, del commercio e dell'artigianato, e dura in carica tre anni. 3.) Il Consiglio invita alle proprie riunioni rappresentanti delle associazioni di tutela ambientale riconosciute e delle associazioni nazionali delle cooperative dei consumatori. Possono altresi' essere invitati i rappresentanti di enti ed organismi che svolgono funzioni di regolamentazione o di normazione del mercato, delle categorie economiche e sociali interessate, delle pubbliche amministrazioni competenti, nonche' esperti delle materie trattate. 4.) E' compito del Consiglio: a) esprimere pareri, ove richiesto, sugli schemi di disegni di legge del Governo, nonche' sui disegni di legge di iniziativa parlamentare e sugli schemi di regolamenti che riguardino i diritti e gli interessi dei consumatori e degli utenti; b) formulare proposte in materia di tutela dei consumatori e degli utenti, anche in riferimento ai programmi e alle politiche comunitarie; c) promuovere studi, ricerche e conferenze sui problemi del consumo e sui diritti dei consumatori e degli utenti, ed il controllo della qualita' e della sicurezza dei prodotti e dei servizi; d) elaborare programmi per la diffusione delle informazioni presso i consumatori e gli utenti; e) favorire iniziative volte a promuovere il potenziamento dell'accesso dei consumatori e degli utenti ai mezzi di giustizia previsti per la soluzione delle controversie; f) favorire ogni forma di raccordo e coordinamento tra le politiche nazionali e regionali in materia di tutela dei consumatori e degli utenti, assumendo anche iniziative dirette a promuovere la piu' ampia rappresentanza degli interessi dei consumatori e degli utenti nell'ambito delle autonomie locali. A tal fine il presidente convoca una volta all'anno una sessione a carattere programmatico cui partecipano di diritto i presidenti degli organismi rappresentativi dei consumatori e degli utenti previsti dagli ordinamenti regionali e delle province autonome di Trento e di Bolzano; g) stabilire rapporti con analoghi organismi pubblici o privati di altri Paesi e dell'Unione europea.

Art. 5 (Elenco delle associazioni dei consumatori e degli utenti rappresentative a livello nazionale): 1.) Presso il Ministero dell'industria, del commercio e dell'artigianato e' istituito l'elenco delle associazioni dei consumatori e degli utenti rappresentative a livello nazionale. 2.) L'iscrizione nell'elenco e' subordinata al possesso, da comprovare con la presentazione di documentazione conforme alle prescrizioni e alle procedure stabilite con decreto del Ministro dell'industria, del commercio e dell'artigianato, da emanare entro sessanta giorni dalla data di entrata in vigore della presente legge, dei seguenti requisiti: a) avvenuta costituzione, per atto pubblico o per scrittura privata autenticata, da almeno tre anni e possesso di uno statuto che sancisca un ordinamento a base democratica e preveda come scopo esclusivo la tutela dei consumatori e degli utenti, senza fine di lucro; b) tenuta di un elenco degli iscritti, aggiornato annualmente con l'indicazione delle quote versate direttamente all'associazione per gli scopi statutari; c) numero di iscritti non inferiore allo 0,5 per mille della popolazione nazionale e presenza sul territorio di almeno cinque regioni o province autonome, con un numero di iscritti non inferiore allo 0,2 per mille degli abitanti di ciascuna di esse, da certificare con dichiarazione sostitutiva dell'atto di notorieta' resa dal legale rappresentante dell'associazione con le modalita' di cui all'articolo 4 della legge 4 gennaio 1968, n. 15; d) elaborazione di un bilancio annuale delle entrate e delle uscite con indicazione delle quote versate dagli associati e tenuta dei libri contabili, conformemente alle norme vigenti in materia di contabilita' delle associazioni non riconosciute; e) svolgimento di un'attivita' continuativa nei tre anni precedenti; f) non avere i suoi rappresentanti legali subito alcuna

condanna, passata in giudicato, in relazione all'attivita' dell'associazione medesima, e non rivestire i medesimi rappresentanti la qualifica di imprenditori o di amministratori di imprese di produzione e servizi in qualsiasi forma costituite, per gli stessi settori in cui opera l'associazione. 3.) Alle associazioni dei consumatori e degli utenti e' preclusa ogni attivita' di promozione o pubblicita' commerciale avente per oggetto beni o servizi prodotti da terzi ed ogni connessione di interessi con imprese di produzione o di distribuzione. 4.) Il Ministro dell'industria, del commercio e dell'artigianato provvede annualmente all'aggiornamento dell'elenco. 5.) All'elenco di cui al presente articolo possono iscriversi anche le associazioni dei consumatori e degli utenti operanti esclusivamente nei territori ove risiedono minoranze linguistiche costituzionalmente riconosciute, in possesso dei requisiti di cui al comma 2, lettere a), b), d), e) e f), nonche' con un numero di iscritti non inferiore allo 0,5 per mille degli abitanti della regione o provincia autonoma di riferimento, da certificare con dichiarazione sostitutiva dell'atto di notorieta' resa dal legale rappresentante dell'associazione con le modalita' di cui all'articolo 4 della legge 4 gennaio 1968, n. 15.

Art. 6 (Agevolazioni e contributi): 1.) Le agevolazioni e i contributi previsti dalla legge 5 agosto 1981, n. 416, in materia di disciplina delle imprese editrici e provvidenze per l'editoria, sono estesi, con le modalita' ed i criteri di graduazione definiti con apposito decreto del Presidente del Consiglio dei Ministri da emanare entro novanta giorni dalla data di entrata in vigore della presente legge, alle attivita' editoriali delle associazioni iscritte nell'elenco di cui all'articolo 5 della presente legge.

Art. 7 (Copertura finanziaria): 1.) Per le finalita' della presente legge e' autorizzata la spesa massima di 3 miliardi di lire annue a decorrere dal 1998, da destinare, rispettivamente, nella misura di lire 2 miliardi annue allo svolgimento delle attivita' promozionali del Consiglio di cui all'articolo 4 e di lire 1 miliardo alle agevolazioni e ai contributi di cui all'articolo 6. 2.) Alla copertura degli oneri di cui al comma 1 si provvede mediante corrispondente riduzione dello stanziamento iscritto, ai fini del bilancio triennale 1998-2000, nell'ambito dell'unita' previsionale di base di parte corrente "Fondo speciale" dello stato di previsione del Ministero del tesoro, del bilancio e della programmazione economica per l'anno finanziario 1998, allo scopo parzialmente utilizzando l'accantonamento relativo alla Presidenza del Consiglio dei Ministri. 3.) Il Ministro del tesoro, del bilancio e della programmazione economica e' autorizzato ad apportare, con propri decreti, le occorrenti variazioni di bilancio.

Art. 8 (Norma transitoria): 1.) Fino al 31 dicembre 1999, il Consiglio di cui all'articolo 4 e' composto dai membri della Consulta dei consumatori e degli utenti istituita con decreto del Ministro dell'industria, del commercio e dell'artigianato 11 novembre 1994, e successive modificazioni, ed e' integrato dai rappresentanti delle associazioni iscritte nell'elenco di cui all'articolo 5, ove non gia' rappresentate nella Consulta. 2.) Fino alla data di cui al comma 1, il Ministro dell'industria, del commercio e dell'artigianato, sentito il parere del Consiglio di cui all'articolo 4, puo' iscrivere in via provvisoria nell'elenco di cui all'articolo 5 associazioni che non siano in possesso del requisito di cui alla lettera c) del comma 2 del medesimo articolo 5, fermi i restanti requisiti. Tale iscrizione ha effetto fino alla data di cui al comma 1.

4 Italian Law "La Pergola" (Legge No 86, 9 marzo 1989), Gazz.Uff. No 58, 10 marzo 1989

Art. 1 (Norme generali sulla partecipazione dell'Italia al processo normativo comunitario e sulle procedure di esecuzione degli obblighi comunitari): 1.) Con i procedimenti e le misure previste dalla presente legge, lo Stato garantisce l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee che conseguono: a) all'emanazione di regolamenti, direttive, decisioni e raccomandazioni (CECA) che, in conformità alle norme dei trattati istitutivi della Comunità europea del carbone e dell'acciaio, della Comunità economica europea e della Comunità europea dell'energia atomica, vincolano la Repubblica italiana ad adottare provvedimenti di attuazione; b) all'accertamento giurisdizionale, con sentenza della Corte di giustizia delle Comunità europee, della incompatibilità di norme legislative e regolamentari con le disposizioni dei suddetti trattati. 2.) Con le modalità stabilite dalla presente legge, il Governo assicura l'informazione del Parlamento sullo svolgimento dei processi normativi comunitari.

Art. 2 (Legge comunitaria): 1.) Il Ministro competente per il coordinamento delle politiche comunitarie trasmette alle Camere, contestualmente alla loro ricezione, gli atti normativi e di indirizzo emanati dagli organi dell'Unione europea e delle Comunità europee; verifica, con la collaborazione delle amministrazioni interessate, lo stato di conformità dell'ordinamento interno e degli indirizzi di politica del Governo in relazione ai suddetti atti e ne trasmette tempestivamente le risultanze, anche con riguardo alle misure da intraprendere per assicurare tale conformità, alle Commissioni parlamentari competenti per la formulazione di ogni opportuna osservazione ed atto

d'indirizzo. 2.) Sulla base della verifica e delle osservazioni ed atti d'indirizzo di cui al comma 1, il Ministro competente per il coordinamento delle politiche comunitarie, entro il 31 gennaio di ogni anno, presenta al Parlamento, di concerto con il Ministro degli affari esteri e con gli altri Ministri interessati, un disegno di legge recante: «Disposizioni per l'adempimento degli obblighi derivanti dall'appartenenza dell'Italia alle Comunità europee»; tale dicitura è completata dall'indicazione: «legge comunitaria» seguita dall'anno di riferimento. 3.) Nell'ambito della relazione al disegno di legge di cui al comma 2: a) si riferisce sullo stato di conformità dell'ordinamento interno al diritto comunitario e sullo stato delle eventuali procedure d'infrazione dando conto, in particolare, della giurisprudenza della Corte di giustizia delle Comunità europee relativa alle eventuali inadempienze e violazioni degli obblighi comunitari da parte della Repubblica italiana; b) si fornisce l'elenco delle direttive attuate o da attuare in via amministrativa; c) si dà partitamente conto delle ragioni dell'eventuale omesso inserimento delle direttive il cui termine di recepimento è già scaduto e di quelle il cui termine di recepimento scade nel periodo di riferimento, in relazione ai tempi previsti per l'esercizio della delega legislativa.

Art. 3 (Contenuti della legge comunitaria): 1.) Il periodico adeguamento dell'ordinamento nazionale all'ordinamento comunitario è assicurato, di norma, dalla legge comunitaria annuale, mediante: a) disposizioni modificative o abrogative di norme vigenti in contrasto con gli obblighi indicati all'articolo 1, comma 1; b) disposizioni occorrenti per dare attuazione, o assicurare l'applicazione, agli atti del Consiglio o della Commissione delle Comunità europee di cui alla lettera a) del comma 1 dell'articolo 1, anche mediante conferimento al Governo di delega legislativa; c) autorizzazione al Governo ad attuare in via regolamentare le direttive o le raccomandazioni. 2.) (CECA) a norma dell'articolo 4.

Art. 4 (Attuazione in via regolamentare): 1.) Nelle materie già disciplinate con legge, ma non riservate alla legge, le direttive possono essere attuate mediante regolamento se così dispone la legge comunitaria. 2.) Il Governo presenta alle Camere, in allegato al disegno di legge comunitaria, un elenco delle direttive per l'attuazione delle quali chiede l'autorizzazione di cui all'articolo 3, lettera c. 3.) Se le direttive consentono scelte in ordine alle modalità della loro attuazione o se si rende necessario introdurre sanzioni penali o amministrative od individuare le autorità pubbliche cui affidare le funzioni amministrative inerenti alla applicazione della nuova disciplina, la legge comunitaria detta le relative disposizioni. 4.) Se la legge comunitaria lo dispone, prima dell'emanazione del regolamento, lo schema di decreto sottoposto al parere delle Commissioni permanenti della Camera dei deputati e del Senato della Repubblica competenti per materia, che dovranno esprimersi nel termine di quaranta giorni dalla comunicazione. Decorso tale termine, i decreti sono emanati anche in mancanza di detto parere. 5.) Il regolamento di attuazione è adottato secondo le procedure di cui all'articolo 17 della legge 23 agosto 1988, n. 400, su proposta del Presidente del Consiglio dei ministri, o del Ministro per il coordinamento delle politiche comunitarie da lui delegato, entro quattro mesi dalla data di entrata in vigore della legge comunitaria. In questa ipotesi il parere del Consiglio di Stato deve essere espresso entro quaranta giorni dalla richiesta. Decorso tale termine il regolamento è emanato anche in mancanza di detto parere. 6.) La legge comunitaria provvede in ogni caso a norma dell'articolo 3, lettera b), ove l'attuazione delle direttive comporti: a) l'istituzione di nuovi organi o strutture amministrative; b) la previsione di nuove spese o di minori entrate. 7.) Restano salve le disposizioni di legge che consentono, per materie particolari, il recepimento di direttive mediante atti amministrativi.

Art. 5 (Attuazioni modificative): 1.) Fermo quanto previsto dall'articolo 20 della legge 16 aprile 1987, n. 183, la legge comunitaria può disporre che, all'attuazione di ciascuna modifica delle direttive da attuare mediante regolamento a norma dell'articolo 4, si provveda con la procedura di cui ai commi 4 e 5 del medesimo articolo. 2.) Le disposizioni del comma 1 e dell'articolo 4 sono applicabili, ove occorra, anche per l'attuazione degli altri provvedimenti comunitari di cui all'articolo 1, comma 1, lettera a).

Art. 6 (Decisioni delle Comunità europee): 1.) A seguito della notificazione di decisioni adottate dal Consiglio o dalla Commissione delle Comunità europee, destinate alla Repubblica italiana, che rivestono particolare importanza per gli interessi nazionali o comportano rilevanti oneri di esecuzione, il Ministro per il coordinamento delle politiche comunitarie, consultati il Ministro degli affari esteri e i Ministri interessati e d'intesa con essi, ne riferisce al Consiglio dei Ministri. 2.) Il Consiglio dei Ministri, se non delibera l'eventuale impugnazione della decisione dinanzi alla Corte di giustizia delle Comunità europee, emana le direttive opportune per la esecuzione della decisione a cura delle autorità competenti. 3.) Se l'esecuzione della decisione investe le competenze di una regione o di una provincia autonoma, il presidente della regione o della provincia interessata interviene alla seduta del Consiglio dei Ministri, con voto consultivo, salvo quanto previsto dagli statuti speciali.

when the implementation of Community law takes place, and joint enforcement of national law is excluded.[10]

In contrast, the 'double control theory' conceives the relationship between Community law and national law in terms of autonomy and independence, and outlines the different purposes of Community antitrust law in comparison with national laws; the concurrence of both laws has made it possible to reduce the conflicts. It is obvious, in fact, that the problems have arisen when the application of both disciplines leads to different solutions. This risk seems likely to be excluded in the Italian legal system, where Article 2 and 3 of the national Antitrust Law[11] again present Article 81 and 82 EC.

A temperament to the principle of double control has been shown in the case of collusion prohibited by Community law but allowed by national law;[12] the supremacy of Community law makes national law inapplicable. In contrast, according to national law, collusion which has not been submitted to Article 81 (1) (ex Article 85 (1)) EC will be prohibited.

4 Direct enforcement of Community law by national authorities and judges

The most important limit to concurrent jurisdiction, as we mentioned, belongs to Community institutions and national institutions, represented in Article 9 (3) of Council Regulation 17/62 of 6 February 1962[13] (first enforcement Regulation of ex Articles 85 and 86 EC), which excludes the intervention of the 'National Authority' in cases where the Commission has already started a procedure. The above-mentioned rule of Regulation 17/62 refers to the same authorities to whom the State laws confer the task of enforcing the law of

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[10] See Frignani / Waelbroeck (eds), *Disciplina della concorrenza nella CE*, 1996, p. 100; Donaviti, *Introduzione della disciplina antitrust nel sistema legislativo italiano*, 1990, p. 368; Catalano, 'Competenze comunitarie e competenze degli Stati membri in materia di regole di concorrenza', Foro it., 1969, IV, 85; Gori, 'Applicazione parallela del diritto comunitario e del diritto nazionale in materia di concorrenza', I (1969) Giur.cost. 993; Stolfi, 'Il conflitto "norma comunitaria legge interna', 1 (1969) Riv.dir.comm., 1.

[11] Act No 287 of 10 October 1990 "Norme per la tutela della concorrenza e del mercato", published in Gazz.Uff. No 240/1990 of 13 October 1990 ('Antitrust Law').

[12] See ECJ, Case 14/68 of 13 February 1969, *Walt Wilhelm*, ECR 1969, p. 1; ECJ, Cases *'Profumi'*, three decisions dated 10 July 1980 (Case 253/78, *Procureur de la République v Giry, Guerlain ed al*, ECR 1980, p. 2327): Cases 1,2,3/79, *Rochas, Laurin and Nina Ricci*; Case 27/79 of 10 July 1980, *Marty- Lauder*, ECR 1980, p. 2481; and Case 99/79 of 10 July 1980, *Lancôme e Cosparfrance v Etos*, ECR 1980, p. 2511. See also recently Court of First Instance, Case T 575/93, of 9 January 1996, *Casper Koelmann v Commission and BUMA*, ECR 1996, p. II-1; *cf* Saggio, 'Competenze rispettive delle autorità comunitarie e nazionali', (1997) Il Diritto dell'Unione Europea, 1; Van Bael-Bellis, *Il diritto della concorrenza nella Comunità Europea*, Torino, 1995, p. 902; Frignani-Waelbroeck, 1996, (*op cit* note 10) at p. 116; Siracusa / Scarsellati / Sforzini, 'Il diritto della concorrenza italiano e comunitario: un nuovo rapporto', Foro it. 1992, IV, 249.

[13] First enforcement Regulation of Articles 85 and 86 EC, published in OJ L 13/204 of 21 February 1962, which has come into force on 13 March 1962, and modified by the following Regulations.

competition, and not the judiciary institutions, whose task is to apply Community laws in private disputes.[14]

A solution to the problem of concurrent and contemporary jurisdictions of national judges and the Commission has been found in Commission Notice of 13 February 1993, which relates to the co-operation between national judges and the Commission in matters of Articles 81 and 82 EC.[15] In particular, this Notice states that the Commission is the responsible authority for the orientation and enforcement of community policy concerning competition, and that this is the reason why it has to act in respect of public interests; it also asserts that "*national judges have the task of protecting the subjective rights of individuals in relationships between them*". These principles are drawn right from a Community line of decisions,[16] and, in the same way, this line of decisions has founded the statement that says "*as the prohibitions established by Article 85 (1) and Article 86, aim at producing direct effects on relationships between individuals, these articles confer to the latter rights that national judges have to protect*" and that "*Article 85 (2) allows them to determine, in the observance of the applicable national procedure, consequences of civil law implied in the prohibition stated in Article 85*".[17]

The competence of national judges belongs to civil law, as do the consequences arising from unlawful competition, such as restoration, compensatory claims, interim measures, as well as injunction competition infringement.[18] The above-mentioned Notice assumes the

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[14] *Cf* Frignani-Waelbroeck, 1996, (*op cit* note 10) at pp. 236 ff.; Benedettelli, 'Sul rapporto fra diritto comunitario e diritto Italiano della concorrenza', Foro it., 1990, IV, 235; Herbert, 'Rapporti tra le procedure davanti alla Commissione ed ai giudici nazionali, Atti del congresso di Treviso, 2 and 3 October 1992, Antitrust tra diritto nazionale e diritto comunitario', (1993) Riv.dir.int. 450; and ECJ, Case 13/61 of 6 April 1962, *De Geus en Uitdenbogerd v R. Bosch GmbH a.o.*, ECR 1962, p. 89, in Foro it. 1962, I, 1625; ECJ, Case 43/69 of 18 March 1970, *Brauerei A. Bilger Söhne GmbH v H. & M. Jehle*, ECR 1970, p. 127, *ibid,* 1970, IV, 75; and ECJ, Case 127/73 of 30 January 1974, *BRT v Sabam,* ECR 1974, p. 51.

[15] Commission notice on co-operation between national courts and the Commission in applying Articles 85 and 86 of the EC Treaty (OJ 1993 C 39/1993/p. 6 of 13 February 1993).

[16] ECJ, Case C-234/89 of 28 February 1991, *Stergios Delimitis v Henninger Bräu AG*, ECR 1986, p. 1425; and Decision of the Court of First Instance, Case T 24/90, of 18 September 1992, *Automec v Commission*, ECR 1992, p. II-2223.

[17] ECJ, Case *BRT v Sabam* (see *supra*, note 14); ECJ, Case 48/72, of 6 February 1973, *Brasserie de Haecht v Wilkin Janssen*, ECR 1967, p. 525; ECJ, Case 319/82 of 14 December 1983, *Société de vente des ciments et béton v Kerpen & Kerpen*, ECR 1983, p. 4173.

[18] ECJ, Case *Ciments et Béton v Kerpen & Kerpen,* already mentioned in the above note, in G.A.D.I., 1984, No 1828; ECJ, Case C-213/89, of 19 June 1990, *The Queen v Secretary of State for Transport, ex parte Factortame*, ECR 1990, p. I-2443, in Giur.it., I, 1, 1122, with note of Consolo, 'Fondamento comunitario della giurisprudenza cautelare', and in A.I.D.A., 1990, 832, with note of Muscardini, 'Potere cautelare dei giudici nazionali in materie disciplinate dal diritto comunitario'. See, also, in the matter of care: ECJ, Cases 143/88 and 92/89, of 21 February 1991, *Zuckerfabrik Süderdithmarschen & Zuckerfabrik Soest v Hauptzollamt Itzehoe & Hauptzollamt Paderborn*, ECR 1991, p. 415, *idem,* 1991, I, 415; ECJ, Case 465/93 of 9 November 1995, *Atlanta Fruchthandelsgesellschaft a.o. v Bundesamt*, ECR 1995, p. I-3799, in (1996) Giorn.dir.amm. 333, with note of

considérées comme producteurs, au sens du présent titre, les personnes dont la responsabilité peut être recherchée sur le fondement des articles 1792 à 1792-6 et 1646-1.

Art. 1386-7: Le vendeur, le loueur, à l'exception du crédit-bailleur ou du loueur assimilable au crédit-bailleur, ou tout autre fournisseur professionnel est responsable du défaut de sécurité du produit dans les mêmes conditions que le producteur. Le recours du fournisseur contre le producteur obéit aux mêmes règles que la demande émanant de la victime directe du défaut. Toutefois, il doit agir dans l'année suivant la date de sa citation en justice.

Art. 1386-8: En cas de dommage causé par le défaut d'un produit incorporé dans un autre, le producteur de la partie composante et celui qui a réalisé l'incorporation sont solidairement responsables.

Art. 1386-9: Le demandeur doit prouver le dommage, le défaut et le lien de causalité entre le défaut et le dommage.

Art. 1386-10: Le producteur peut être responsable du défaut alors même que le produit a été fabriqué dans le respect des règles de l'art ou de normes existantes ou qu'il a fait l'objet d'une autorisation administrative.

Art. 1386-11: Le producteur est responsable de plein droit à moins qu'il ne prouve: 1) Qu'il n'avait pas mis le produit en circulation; 2) Que, compte tenu des circonstances, il y a lieu d'estimer que le défaut ayant causé le dommage n'existait pas au moment où le produit a été mis en circulation par lui ou que ce défaut est né postérieurement; 3) Que le produit n'a pas été destiné à la vente ou à toute autre forme de distribution; 4) Que l'état des connaissances scientifiques et techniques, au moment où il a mis le produit en circulation, n'a pas permis de déceler l'existence du défaut; 5) Ou que le défaut est dû à la conformité du produit avec des règles impératives d'ordre législatif ou réglementaire.

Le producteur de la partie composante n'est pas non plus responsable s'il établit que le défaut est imputable à la conception du produit dans lequel cette partie a été incorporée ou aux instructions données par le producteur de ce produit.

Art. 1386-12: Le producteur ne peut invoquer la cause d'exonération prévue au 4° de l'article 1386-11 lorsque le dommage a été causé par un élément du corps humain ou par les produits issus de celui-ci. Le producteur ne peut invoquer les causes d'exonération prévu es aux 4° et 5° de l'article 1386-11 si, en présence d'un défaut qui s'est révélé dans un délai de dix ans après la mise en circulation du produit, il n'a pas pris les dispositions propres à en prévenir les conséquences dommageables.

Art. 1386-13: La responsabilité du producteur peut être réduite ou supprimée, compte tenu de toutes les circonstances, lorsque le dommage est causé conjointement par un défaut du produit et par la faute de la victime ou d'une personne dont la victime est responsable.

Art. 1386-14: La responsabilité du producteur envers la victime n'est pas réduite par le fait d'un tiers ayant concouru à la réalisation du dommage.

Art. 1386-15: Les clauses qui visent à écarter ou à limiter la responsabilité du fait des produits défectueux sont interdites et réputées non écrites. Toutefois, pour les dommages causés aux biens qui ne sont pas utilisés par la victime principalement pour son usage ou sa consommation privée, les clauses stipulées entre professionnels sont valables.

Art. 1386-16: Sauf faute du producteur, la responsabilité de celui-ci, fondée sur les dispositions du présent titre, est éteinte dix ans après la mise en circulation du produit même qui a causé le dommage à moins que, durant cette période, la victime n'ait engagé une action en justice.

Art. 1386-17: L'action en réparation fondée sur les dispositions du présent titre se prescrit dans un délai de trois ans à compter de la date à laquelle le demandeur a eu ou aurait dû avoir connaissance du dommage, du défaut et de l'identité du producteur.

Art. 1386-18: Les dispositions du présent titre ne portent pas atteinte aux droits dont la victime d'un dommage peut se prévaloir au titre du droit de la responsabilité contractuelle ou extracontractuelle ou au titre d'un régime spécial de responsabilité. Le producteur reste responsable des conséquences de sa faute et de celle des personnes dont il répond.

6 Ordonnance No 86-1243, 1 décembre 1986 („relative à la liberté des prix et de la concurrence") Journal Officiel du 9 décembre 1986

Titre I (De la liberté des prix)

Art. 1: L'ordonnance n° 45-1483 du 30 juin 1945 est abrogée. Les prix des biens, produits et services relevant antérieurement de ladite ordonnance sont librement déterminés par le jeu de la concurrence. Toutefois, dans les secteurs ou les zones où la concurrence par les prix est limitée en raison soit de situations de monopole ou de difficultés durables d'approvisionnement, soit de dispositions législatives ou réglementaires, un décret en Conseil d'Etat peut réglementer les prix après consultation du Conseil de la concurrence. Les dispositions des deux premiers alinéas ne font pas obstacle à ce que le Gouvernement arrête, par décret en Conseil d'Etat, contre des hausses ou des baisses excessives de prix, des mesures temporaires motivées par une situation de crise, des circonstances exceptionnelles, une calamité publique ou une situation manifestement anormale du marché dans un secteur déterminé. Le décret est pris après consultation du Conseil national de la consommation. Il précise sa durée de validité qui ne peut excéder six mois.

Titre II (Du conseil de la concurrence)

Art. 2: Il est créé un Conseil de la concurrence comprenant dix-sept membres nommés pour une durée de six ans par décret pris sur le rapport du ministre chargé de l'économie. Il se compose de : 1.) Huit membres ou anciens membres du Conseil d'Etat, de la Cour de cassation, de la Cour des comptes ou des autres juridictions administratives ou judiciaires; 2.) Quatre personnalités choisies en raison de leur compétence en matière économique ou en matière de concurrence et de consommation; 3.) Cinq personnalités exerçant ou ayant exercé leurs activités dans les secteurs de la production, de la distribution, de l'artisanat, des services ou des professions libérales.
Le président et les trois vice-présidents sont nommés, pour trois d'entre eux, parmi les membres ou anciens membres du Conseil d'Etat, de la Cour de cassation ou de la Cour des comptes, et pour l'un d'entre eux, parmi les catégories de personnalités mentionnées aux 2 et 3 ci-dessus. Les quatre personnalités prévues au 2 sont choisies sur une liste de huit noms présentée par les huit membres prévus au 1. Le mandat des membres du Conseil de la concurrence est renouvelable.

Art. 3: Le président et les vice-présidents exercent leurs fonctions à plein temps. Ils sont soumis aux règles d'incompatibilité prévues pour les emplois publics. Est déclaré démissionnaire d'office par le ministre tout membre du conseil qui n'a pas participé, sans motif valable, à trois séances consécutives ou qui ne remplit pas les obligations prévues aux deux alinéas ci-dessous. Tout membre du conseil doit informer le président des intérêts qu'il détient ou vient à acquérir et des fonctions qu'il exerce dans une activité économique. Aucun membre du conseil ne peut délibérer dans une affaire où il a un intérêt ou s'il représente ou a représenté une des parties intéressées. Le commissaire du Gouvernement auprès du conseil est désigné par le ministre chargé de l'économie.

Art. 4: Le conseil peut siéger soit en formation plénière, soit en sections, soit en commission permanente. La commission permanente est composée du président et des trois vice-présidents. En cas de partage égal des voix, la voix du président de la formation est prépondérante. Le rapporteur général, le rapporteur ou les rapporteurs généraux adjoints et les rapporteurs permanents sont nommés sur proposition du président par arrêté du ministre chargé de l'économie. Les autres rapporteurs sont désignés par le président. Les crédits attribués au Conseil de la concurrence pour son fonctionnement sont inscrits au budget du ministère chargé de l'économie. Le président est ordonnateur des recettes et des dépenses du conseil.

Art. 5: Le Conseil de la concurrence peut être consulté par les commissions parlementaires sur les propositions de lois ainsi que sur toute question concernant la concurrence. Il donne son avis sur toute question de concurrence à la demande du Gouvernement. Il peut également donner son avis sur les mêmes questions à la demande des collectivités territoriales, des organisations professionnelles et syndicales, des organisations de consommateurs agréées, des chambres d'agriculture, des chambres de métiers ou des chambres de commerce et d'industrie, en ce qui concerne les intérêts dont elles ont la charge.

Art. 6: Le conseil est obligatoirement consulté par le Gouvernement sur tout projet de texte réglementaire instituant un régime nouveau ayant directement pour effet: 1.) De soumettre l'exercice d'une profession ou l'accès à un marché à des restrictions quantitatives; 2.) D'établir des droits exclusifs dans certaines zones; 3.) D'imposer des pratiques uniformes en matière de prix ou de conditions de vente.

Titre III (Des pratiques anticoncurrentielles)

Art. 7: Sont prohibées, lorsqu'elles ont pour objet ou peuvent avoir pour effet d'empêcher, de restreindre ou de fausser le jeu de la concurrence sur un marché, les actions concertées, conventions, ententes expresses ou tacites ou coalitions, notamment lorsqu'elles tendent à: 1.) Limiter l'accès au marché ou le libre exercice de la concurrence par d'autres entreprises; 2.) Faire obstacle à la fixation des prix par le libre jeu du marché en favorisant artificiellement leur hausse ou leur baisse; 3.) Limiter ou contrôler la production, les débouchés, les investissements ou le progrès technique; 4.) Répartir les marchés ou les sources d'approvisionnement.

Art. 8: Est prohibée, dans les mêmes conditions, l'exploitation abusive par une entreprise ou un groupe d'entreprises: 1.) D'une position dominante sur le marché intérieur ou une partie substantielle de celui-ci; 2.) De l'état de dépendance économique dans lequel se trouve, à son égard, une entreprise cliente ou fournisseur qui ne dispose pas de solution équivalente.
Ces abus peuvent notamment consister en refus de vente, en ventes liées ou en conditions de vente discriminatoires ainsi que dans la rupture de relations commerciales établies, au seul motif que le partenaire refuse de se soumettre à des conditions commerciales injustifiées.

Art. 9: Est nul tout engagement, convention ou clause contractuelle se rapportant à une pratique prohibée par les articles 7 et 8.

Art. 10: Ne sont pas soumises aux dispositions des articles 7 et 8 les pratiques: 1.) Qui résultent de l'application d'un texte législatif ou d'un texte réglementaire pris pour son application; 2.) Dont les auteurs peuvent justifier qu'elles ont pour effet d'assurer un progrès économique et qu'elles réservent aux utilisateurs une partie équitable du profit qui en résulte, sans donner aux entreprises intéressées la possibilité d'éliminer la concurrence pour une partie substantielle des produits en cause. Ces pratiques, qui peuvent consister à organiser, pour les produits agricoles ou d'origine agricole, sous une même marque ou enseigne, les volumes et la qualité de production ainsi que la politique commerciale, y compris en convenant d'un prix de cession commun, ne doivent imposer des restrictions à la concurrence que dans la mesure où elles sont indispensables pour atteindre cet objectif de progrès.
Certaines catégories d'accords ou certains accords, notamment lorsqu'ils ont pour objet d'améliorer la gestion des entreprises moyennes ou petites, peuvent être reconnues comme satisfaisant à ces conditions par décret pris après avis conforme du Conseil de la concurrence.

Art. 10-1: Sont prohibées les offres de prix ou pratiques de prix de vente aux consommateurs abusivement bas par rapport aux coûts de production, de transformation et de commercialisation, dès lors que ces offres ou pratiques ont pour objet ou peuvent avoir pour effet d'éliminer d'un marché ou d'empêcher d'accéder à un marché une entreprise ou l'un de ses produits. Les coûts de commercialisation comportent également et impérativement tous les frais résultant des obligations légales et réglementaires liées à la sécurité des produits. Ces dispositions ne sont pas applicables en cas de revente en l'état, à l'exception des enregistrements sonores reproduits sur supports matériels.

Art. 11: Le Conseil de la concurrence peut être saisi par le ministre chargé de l'économie. Il peut se saisir d'office ou être saisi par les entreprises ou, pour toute affaire qui concerne les intérêts dont ils ont la charge, par les organismes visés au deuxième alinéa de l'article 5. Il examine si les pratiques dont il est saisi entrent dans le champ des articles 7, 8 ou 10-1 ou peuvent se trouver justifiées par application de l'article 10. Il prononce, le cas échéant, des sanctions et des injonctions. Lorsque les faits lui paraissent de nature à justifier l'application de l'article 17, il adresse le dossier au procureur de la République. Cette transmission interrompt la prescription de l'action publique.

Art. 12: Le Conseil de la concurrence peut, après avoir entendu les parties en cause et le commissaire du gouvernement, prendre les mesures conservatoires qui lui sont demandées par le ministre chargé de l'économie, par les personnes mentionnées au deuxième alinéa de l'article 5 ou par les entreprises. Ces mesures ne peuvent intervenir que si la pratique dénoncée porte une atteinte grave et immédiate à l'économie générale, à celle du secteur intéressé, à l'intérêt des consommateurs ou à l'entreprise plaignante. Elles peuvent comporter la suspension de la pratique concernée ainsi qu'une injonction aux parties de revenir à l'état antérieur. Elles doivent rester strictement limitées à ce qui est nécessaire pour faire face à l'urgence. La décision du conseil peut faire l'objet d'un recours en annulation ou en réformation par les parties en cause et le commissaire du gouvernement devant la cour d'appel de

Paris au maximum dix jours après sa notification. La cour statue dans le mois du recours. Le recours n'est pas suspensif. Toutefois, le premier président de la cour d'appel de Paris peut ordonner qu'il soit sursis à l'exécution des mesures conservatoires, si celles-ci sont susceptibles d'entraîner des conséquences manifestement excessives ou s'il est intervenu, postérieurement à leur notification, des faits nouveaux d'une exceptionnelle gravité. Les mesures conservatoires sont publiées au Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes.

Art. 13: Le Conseil de la concurrence peut ordonner aux intéressés de mettre fin aux pratiques anticoncurrentielles dans un délai déterminé ou imposer des conditions particulières. Il peut infliger une sanction pécuniaire applicable soit immédiatement, soit en cas d'inexécution des injonctions. Les sanctions pécuniaires sont proportionnées à la gravité des fait reprochés, à l'importance du dommage causé à l'économie et à la situation de l'entreprise ou de l'organisme sanctionné. Elles sont déterminées individuellement pour chaque entreprise ou organisme sanctionné et de façon motivée pour chaque sanction. Le montant maximum de la sanction est, pour une entreprise, de 5 p. 100 du montant du chiffre d'affaires hors taxes réalisé en France au cours du dernier exercice clos. Si le contrevenant n'est pas une entreprise, le maximum est de dix millions de francs. Le Conseil de la concurrence peut ordonner la publication de sa décision dans les journaux ou publications qu'il désigne, l'affichage dans les lieux qu'il indique et l'insertion de sa décision dans le rapport établi sur les opérations de l'exercice par les gérants, le conseil d'administration ou de directoire de l'entreprise. Les frais sont supportés par la personne intéressée.

Art. 14: Si les mesures et injonctions prévues aux articles 12 et 13 ne sont pas respectées, le conseil peut prononcer une sanction pécuniaire dans les limites fixées à l'article 13.

Art. 15: Les décisions du conseil de la concurrence mentionnées au présent titre sont notifiées aux parties en cause et au ministre chargé de l'économie, qui peuvent, dans le délai d'un mois, introduire un recours en annulation ou en réformation devant la cour d'appel de Paris. Les décisions sont publiées au Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes. Le ministre chargé de l'économie veille à leur exécution. Le recours n'est pas suspensif. Toutefois, le premier président de la cour d'appel de Paris peut ordonner qu'il soit sursis à l'exécution de la décision si celle-ci est susceptible d'entraîner des conséquences manifestement excessives ou s'il est intervenu, postérieurement à sa notification, des faits nouveaux d'une exceptionnelle gravité. Le pourvoi en cassation, formé le cas échéant contre l'arrêt de la cour, est exercé dans un délai d'un mois suivant sa notification.

Art. 16: Les sanctions pécuniaires sont recouvrées comme les créances de l'Etat étrangères à l'impôt et au domaine.

Art. 17: Sera punie d'un emprisonnement de quatre ans et d'une amende de 500 000 F ou de l'une de ces deux peines seulement toute personne physique qui, frauduleusement, aura pris une part personnelle et déterminante dans la conception, l'organisation ou la mise en oeuvre de pratiques visées aux articles 7 et 8. Le tribunal peut ordonner que sa décision soit publiée intégralement ou par extraits dans les journaux qu'il désigne, aux frais du condamné.

Art. 18: L'instruction et la procédure devant le Conseil de la concurrence sont pleinement contradictoires.

Art. 19: Le Conseil de la concurrence peut déclarer, par décision motivée, la saisine irrecevable s'il estime que les faits invoqués n'entrent pas dans le champ de sa compétence ou ne sont pas appuyés d'éléments suffisamment probants.

Art. 20: Le Conseil de la concurrence peut décider après que l'auteur de la saisine et le commissaire du Gouvernement ont été mis à même de consulter le dossier et de faire valoir leurs observations, qu'il n'y a pas lieu de poursuivre la procédure.

Art. 21: Sans préjudice des mesures prévues à l'article 12, le conseil notifie les griefs aux intéressés ainsi qu'au commissaire du Gouvernement, qui peuvent consulter le dossier et présenter leurs observations dans un délai de deux mois. Le rapport est ensuite notifié aux parties, au commissaire du Gouvernement et aux ministres intéressés. Il est accompagné des documents sur lesquels se fonde le rapporteur et des observations faites, le cas échéant, par les intéressés. Les parties ont un délai de deux mois pour présenter un mémoire en réponse qui peut être consulté dans les quinze jours qui précèdent la séance par les personnes visées à l'alinéa précédent.

Art. 22: Le président du Conseil de la concurrence peut, après notification des griefs aux parties intéressées, décider que l'affaire sera portée devant la commission permanente, sans établissement préalable d'un rapport. Cette décision est notifiée aux parties. La commission permanente peut prononcer les mesures prévues à l'article 13. Toutefois, la sanction pécuniaire prononcée ne peut excéder 500 000 F pour chacun des auteurs de pratiques prohibées.

Art. 23: Le président du Conseil de la concurrence peut refuser la communication de pièces mettant en jeu le secret des affaires, sauf dans les cas où la communication ou la consultation de ces documents est nécessaire à la procédure ou à l'exercice des droits des parties. Les pièces considérées sont retirées du dossier.

Art. 24 Sera punie des peines fixées par l'article 226-13 du code pénal la divulgation par l'une des parties des informations concernant une autre partie ou un tiers et dont elle n'aura pu avoir connaissance qu'à la suite des communications ou consultations auxquelles il aura été procédé.

Art. 25: Les séances du Conseil de la concurrence ne sont pas publiques. Seules les parties et le commissaire du Gouvernement peuvent y assister. Les parties peuvent demander à être entendues par le conseil et se faire représenter ou assister. Le Conseil de la concurrence peut entendre toute personne dont l'audition lui paraît susceptible de contribuer à son information. Le rapporteur général, le ou les rapporteurs généraux adjoints et le commissaire du Gouvernement peuvent présenter des observations. Le rapporteur général et le rapporteur assistent au délibéré, sans voix délibérative.

Art. 26: Les juridictions d'instruction et de jugement peuvent communiquer au Conseil de la concurrence, sur sa demande, les procès-verbaux ou rapports d'enquête ayant un lien direct avec des faits dont le conseil est saisi. Le conseil peut être consulté par les juridictions sur les pratiques anticoncurrentielles définies aux articles 7, 8 et 10-1 et relevées dans les affaires dont elles sont saisies. Il ne peut donner un avis qu'après une procédure contradictoire. Toutefois, s'il dispose d'informations déjà recueillies au cours d'une procédure antérieure, il peut émettre son avis sans avoir à mettre en oeuvre la procédure prévue au présent texte. Le cours de la prescription est suspendu, le cas échéant, par la consultation du conseil. L'avis du conseil peut être publié après le non-lieu ou le jugement.

Art. 27: Le conseil ne peut être saisi de faits remontant à plus de trois ans s'il n'a été fait aucun acte tendant à leur recherche, leur constatation ou leur sanction.

Titre IV (De la transparence et des pratiques restrictives)

Art. 28 Toute publicité à l'égard du consommateur, diffusée sur tout support ou visible de l'extérieur du lieu de vente, mentionnant une réduction de prix ou un prix promotionnel sur les produits alimentaires périssables doit préciser la nature et l'origine du ou des produits offerts et la période pendant laquelle est maintenue l'offre proposée par l'annonceur . Toute infraction aux dispositions du premier alinéa est punie d'une amende de 100 000 F . Lorsque de telles opérations promotionnelles sont susceptibles, par leur ampleur ou leur fréquence, de désorganiser les marchés, un arrêté interministériel ou, à défaut, préfectoral fixe, pour les produits concernés, la périodicité et la durée de telles opérations. La cessation de la publicité réalisée dans des conditions non conformes aux dispositions du présent article peut être ordonnée dans les conditions prévues à l'article L. 121-3 du code de la consommation.

Art. 31: Tout achat de produits ou toute prestation de service pour une activité professionnelle doivent faire l'objet d'une facturation. Le vendeur est tenu de délivrer la facture dès la réalisation de la vente ou la prestation du service. L'acheteur doit la réclamer. La facture doit être rédigée en double exemplaire. Le vendeur et l'acheteur doivent en conserver chacun un exemplaire. La facture doit mentionner le nom des parties ainsi que leur adresse, la date de la vente ou de la prestation de service, la quantité, la dénomination précise, et le prix unitaire hors T.V.A. des produits vendus et des services rendus ainsi que toute réduction de prix acquise à la date de la vente ou de la prestation de services et directement liée à cette opération de vente ou de prestation de services, à l'exclusion des escomptes non prévus sur la facture. La facture mentionne également la date à laquelle le règlement doit intervenir. Elle précise les conditions d'escompte applicables en cas de paiement à une date antérieure à celle résultant de l'application des conditions générales de vente. Le règlement est réputé réalisé à la date à laquelle les fonds sont mis, par le client, à la disposition du bénéficiaire ou de son subrogé. Toute infraction aux dispositions du présent article est punie d'une amende de 500 000 F . L'amende peut être portée à 50 p. 100 de la somme facturée ou de celle qui aurait dû être facturée. Les personnes morales peuvent être déclarées responsables conformément à l'article 121-2 du code pénal.

Les peines encourues par les personnes morales sont: 1° L'amende suivant les modalités prévues par l'article 131-38 dudit code;2° La peine d'exclusion des marchés publics pour une durée de cinq ans au plus, en application du 5° de l'article 131-39 du code pénal.

Art. 32: I.) Le fait, pour tout commerçant, de revendre ou d'annoncer la revente d'un produit en l'état à un prix inférieur à son prix d'achat effectif est puni de 500 000 F d'amende . Cette amende peut être portée à la moitié des dépenses de publicité dans le cas où une annonce publicitaire, quel qu'en soit le support, fait état d'un prix inférieur au prix d'achat effectif. Le prix d'achat effectif est le prix unitaire figurant sur la facture majoré des taxes sur le chiffre d'affaires, des taxes spécifiques afférentes à cette revente et du prix du transport. Les personnes morales peuvent être déclarées pénalement responsables, dans les conditions prévues par l'article 121-2 du code pénal, de l'infraction prévue au premier alinéa du présent article. Les peines encourues par les personnes morales sont : 1° L'amende suivant les modalités prévues par l'article 131-38 du code pénal ; 2° La peine mentionnée au 9° de l'article 131-39 du même code. La cessation de l'annonce publicitaire peut être ordonnée dans les conditions prévues à l'article L. 121-3 du code de la consommation. II.) Les dispositions qui précèdent ne sont pas applicables : 1° Aux ventes volontaires ou forcées motivées par la cessation ou le changement d'une activité commerciale : aux produits dont la vente présente un caractère saisonnier marqué, pendant la période terminale de la saison des ventes et dans l'intervalle compris entre deux saisons de vente ; aux produits qui ne répondent plus à la demande générale en raison de l'évolution de la mode ou de l'apparition de perfectionnements techniques ; aux produits, aux caractéristiques identiques, dont le réapprovisionnement s'est effectué en baisse, le prix effectif d'achat étant alors remplacé par le prix résultant de la nouvelle facture d'achat ; aux produits alimentaires commercialisés dans un magasin d'une surface de vente de moins de 300 mètres carrés et aux produits non alimentaires commercialisés dans un magasin d'une surface de moins de 1 000 mètres carrés, dont le prix de revente est aligné sur le prix légalement pratiqué pour les mêmes produits par un autre commerçant dans la même zone d'activité ; 2° A condition que l'offre de prix réduit ne fasse pas l'objet d'une quelconque publicité ou annonce à l'extérieur du point de vente aux produits périssables à partir du moment où ils sont menacés d'altération rapide.III.) Les exceptions prévues au II ne font pas obstacle à l'application du 2 de l'article 189 et du 1 de l'article 197 de la loi n° 85-98 du 25 janvier 1985 relative au redressement et à la liquidation judiciaires des entreprises.

Art. 33: Tout producteur, prestataire de services , grossiste ou importateur est tenu de communiquer à tout acheteur de produit ou demandeur de prestation de services pour une activité professionnelle, qui en fait la demande, son barème de prix et ses conditions de vente. Celles-ci comprennent les conditions de règlement et, le cas échéant, les rabais et ristournes. Les conditions de règlement doivent obligatoirement préciser les modalités de calcul et les conditions dans lesquelles des pénalités sont appliquées dans le cas où les sommes dues sont versées après la date de paiement figurant sur la facture, lorsque le versement intervient au-delà du délai fixé par les conditions générales de vente. Ces pénalités sont d'un montant au moins équivalent à celui qui résulterait de l'application d'un taux égal à une fois et demie le taux de l'intérêt légal. La communication prévue au premier alinéa s'effectue par tout moyen conforme aux usages de la profession. Les conditions dans lesquelles un distributeur ou un prestataire de services se fait rémunérer par ses fournisseurs, en contrepartie de services spécifiques, doivent faire l'objet d'un contrat écrit en double exemplaire détenu par chacune des deux parties. Toute infraction aux dispositions visées ci-dessus sera punie d'une amende de 100.000 F. Les personnes morales peuvent être déclarées responsables pénalement, dans les conditions prévues par l'article 121-2 du code pénal. La peine encourue par les personnes morales est l'amende, suivant les modalités prévues par l'article 131-38 dudit code.

Art. 34: Est puni d'une amende de 100 000 F le fait par toute personne d'imposer, directement ou indirectement, un caractère minimal au prix de revente d'un produit ou d'un bien, au prix d'une prestation de service ou à une marge commerciale.

Art. 35: A peine d'une amende de 500 000 F, le délai de paiement, par tout producteur, revendeur ou prestataire de services, ne peut être supérieur : - à trente jours après la fin de la décade de livraison pour les achats de produits alimentaires périssables et de viandes congelées ou surgelées, de poissons surgelés, de plats cuisinés et de conserves fabriqués à partir de produits alimentaires périssables, à l'exception des achats de produits saisonniers effectués dans le cadre de contrats dits de culture visés à l'article 17 de la loi n° 64-678 du 6 juillet 1964 tendant à définir les principes et les modalités du régime contractuel en agriculture ; - à vingt jours après le jour de livraison pour les achats de bétail sur pied destiné à la consommation et de viandes fraîches dérivées ; - à trente jours après la fin du mois de livraison pour les achats de boissons alcooliques passibles des droits de consommation prévus à l'article 403 du code général des impôts ; - à défaut d'accords interprofessionnels conclus en application de la loi n° 75-600 du 10

juillet 1975 relative à l'organisation interprofessionnelle agricole et rendus obligatoires par voie réglementaire à tous les opérateurs sur l'ensemble du territoire métropolitain pour ce qui concerne les délais de paiement, à soixante-quinze jours après le jour de livraison pour les achats de boissons alcooliques passibles des droits de circulation prévus à l'article 438 du même code.

Art. 36: Engage la responsabilité de son auteur et l'oblige à réparer le préjudice causé le fait, par tout producteur, commerçant, industriel ou artisan : 1. De pratiquer, à l'égard d'un partenaire économique, ou d'obtenir de lui des prix, des délais de paiement, des conditions de vente ou des modalités de vente ou d'achat discriminatoires et non justifiés par des contreparties réelles en créant, de ce fait, pour ce partenaire, un désavantage ou un avantage dans la concurrence ; 2. (paragraphes supprimés). 3. D'obtenir ou de tenter d'obtenir un avantage, condition préalable à la passation de commandes, sans l'assortir d'un engagement écrit sur un volume d'achat proportionné et, le cas échéant, d'un service demandé par le fournisseur et ayant fait l'objet d'un accord écrit ; 4. D'obtenir ou de tenter d'obtenir, sous la menace d'une rupture brutale des relations commerciales, des prix, des délais de paiement, des modalités de vente ou des conditions de coopération commerciale manifestement dérogatoires aux conditions générales de vente ; 5. De rompre brutalement, même partiellement, une relation commerciale établie, sans préavis écrit tenant compte des relations commerciales antérieures ou des usages reconnus par des accords interprofessionnels. Les dispositions précédentes ne font pas obstacle à la faculté de résiliation sans préavis, en cas d'inexécution par l'autre partie de ses obligations ou de force majeure ; 6. De participer directement ou indirectement à la violation de l'interdiction de revente hors réseau faite au distributeur lié par un accord de distribution sélective ou exclusive exempté au titre des règles applicables du droit de la concurrence. L'action est introduite devant la juridiction civile ou commerciale compétente par toute personne justifiant d'un intérêt, par le parquet, par le ministre chargé de l'économie ou par le président du Conseil de la concurrence, lorsque ce dernier constate, à l'occasion des affaires qui relèvent de sa compétence, une pratique mentionnée au présent article. Le président de la juridiction saisie peut, en référé, enjoindre la cessation des agissements en cause ou ordonner toute autre mesure provisoire.

Art. 37: Aucune association ou coopérative d'entreprise ou d'administration ne peut, de façon habituelle, offrir des produits à la vente, les vendre ou fournir des services si ces activités ne sont pas prévues par ses statuts.

Art.37-1: Il est interdit à toute personne d'offrir à la vente des produits ou de proposer des services en utilisant, dans des conditions irrégulières , le domaine public de l'Etat, des collectivités locales et de leurs établissements publics. Les infractions à l'interdiction mentionnée à l'alinéa précédent sont recherchées et constatées dans les conditions définies par les articles 45 à 47 et 52. Les agents peuvent consigner, dans des locaux qu'ils déterminent et pendant une durée qui ne peut être supérieure à un mois, les produits offerts à la vente et les biens ayant permis la vente des produits ou l'offre de services . La consignation donne lieu à l'établissement immédiat d'un procès-verbal. Celui-ci comporte un inventaire des biens et des marchandises consignés ainsi que la mention de leur valeur. Il est communiqué dans les cinq jours de sa clôture au procureur de la République et à l'intéressé. La juridiction peut ordonner la confiscation des produits offerts à la vente et des biens ayant permis la vente des produits ou l'offre de services. La juridiction peut condamner l'auteur de l'infraction à verser au Trésor public une somme correspondant à la valeur des produits consignés, dans le cas où il n'a pas été procédé à une saisie.

Titre V (De la concentration économique)

Art. 38: Tout projet de concentration ou toute concentration de nature à porter atteinte à la concurrence notamment par création ou renforcement d'une position dominante peut être soumis, par le ministre chargé de l'économie, à l'avis du Conseil de la concurrence. Ces dispositions ne s'appliquent que lorsque les entreprises qui sont parties à l'acte ou qui en sont l'objet ou qui leur sont économiquement liées ont soit réalisé ensemble plus de 25 p. 100 des ventes, achats ou autres transactions sur un marché national de biens, produits ou services substituables ou sur une partie substantielle d'un tel marché, soit totalisé un chiffre d'affaires hors taxes de plus de sept milliards de francs, à condition que deux au moins des entreprises parties à la concentration aient réalisé un chiffre d'affaires d'au moins deux milliards de francs.

Art.39: La concentration résulte de tout acte, quelle qu'en soit la forme, qui emporte transfert de propriété ou de jouissance sur tout ou partie des biens, droits et obligations d'une entreprise ou qui a pour objet, ou pour effet, de permettre à une entreprise ou à un groupe d'entreprises d'exercer, directement ou indirectement, sur une ou plusieurs autres entreprises une influence déterminante.

Art. 40: Tout projet de concentration ou toute concentration ne remontant pas à plus de trois mois peut être soumis au ministre chargé de l'économie par une entreprise concernée. La notification peut être assortie d'engagements. Le silence gardé pendant deux mois vaut décision tacite d'acceptation du projet de concentration ou de la concentration ainsi que des engagements qui y sont joints. Ce délai est porté à six mois si le ministre saisit le Conseil de la concurrence.

Art. 41: Le Conseil de la concurrence apprécie si le projet de concentration ou la concentration apporte au progrès économique une contribution suffisante pour compenser les atteintes à la concurrence. Le conseil tient compte de la compétitivité des entreprises en cause au regard de la concurrence internationale.

Art. 42: Le ministre chargé de l'économie et le ministre dont relève le secteur économique intéressé peuvent, à la suite de l'avis du Conseil de la concurrence, par arrêté motivé et en fixant un délai, enjoindre aux entreprises, soit de ne pas donner suite au projet de concentration ou de rétablir la situation de droit antérieure, soit de modifier ou compléter l'opération ou de prendre toute mesure propre à assurer ou à rétablir une concurrence suffisante. Ils peuvent également subordonner la réalisation de l'opération à l'observation de prescriptions de nature à apporter au progrès économique et social une contribution suffisante pour compenser les atteintes à la concurrence. Ces injonctions et prescriptions s'imposent quelles que soient les stipulations des parties.

Art. 43: Le Conseil de la concurrence peut, en cas d'exploitation abusive d'une position dominante ou d'un état de dépendance économique, demander au ministre chargé de l'économie d'enjoindre, conjointement avec le ministre dont relève le secteur, par arrêté motivé, à l'entreprise ou au groupe d'entreprises en cause de modifier, de compléter ou de résilier, dans un délai déterminé, tous accords et tous actes par lesquels s'est réalisée la concentration de la puissance économique qui a permis les abus même si ces actes ont fait l'objet de la procédure prévue au présent titre.

Art. 44: La procédure applicable aux décisions du titre V est celle prévue au deuxième alinéa de l'article 21 et aux articles 23 à 25. Toutefois, les intéressés doivent produire leurs observations en réponse à la communication du rapport dans un délai d'un mois. Ces décisions sont motivées et publiées au Bulletin officiel de la concurrence, de la consommation et de la répression des fraudes avec l'avis du Conseil de la concurrence. En cas de non-respect de ces décisions ou des engagements mentionnés à l'article 40, le ministre chargé de l'économie et le ministre dont relève le secteur économique intéressé peuvent, après consultation du Conseil de la concurrence et dans les limites de son avis, prononcer une sanction pécuniaire dont le montant est défini conformément au troisième alinéa de l'article 13 de la présente ordonnance.

Titre VI (Des pouvoirs d'enquêtes)

Art. 45: Des fonctionnaires habilités à cet effet par le ministre chargé de l'économie peuvent procéder aux enquêtes nécessaires à l'application de la présente ordonnance. Les rapporteurs du Conseil de la concurrence disposent des mêmes pouvoirs pour les affaires dont le conseil est saisi. Des fonctionnaires de catégorie A du ministère chargé de l'économie, spécialement habilités à cet effet par le garde des sceaux, ministre de la justice, sur la proposition du ministre chargé de l'économie, peuvent recevoir des juges d'instruction des commissions rogatoires.

Art. 46: Les enquêtes donnent lieu à l'établissement de procès-verbaux et, le cas échéant, de rapports. Les procès-verbaux sont transmis à l'autorité compétente. Un double en est laissé aux parties intéressées. Ils font foi jusqu'à preuve contraire.

Art. 47: Les enquêteurs peuvent accéder à tous locaux, terrains ou moyens de transports à usage professionnel, demander la communication des livres, factures et tous autres documents professionnels et en prendre copie, recueillir sur convocation ou sur place, les renseignements et justifications. Ils peuvent demander à l'autorité dont ils dépendent de désigner un expert pour procéder à toute expertise contradictoire nécessaire.

Art. 48: Les enquêteurs ne peuvent procéder aux visites en tous lieux, ainsi qu'à la saisie de documents, que dans le cadre d'enquêtes demandées par le ministre chargé de l'économie ou le Conseil de la concurrence et sur autorisation judiciaire donnée par ordonnance du président du tribunal de grande instance dans le ressort duquel sont situés les lieux à visiter ou d'un juge délégué par lui. Lorsque ces lieux sont situés dans le ressort de plusieurs juridictions et qu'une action simultanée doit être menée dans chacun d'eux, une ordonnance unique peut être délivrée par l'un des

présidents compétents. Le juge doit vérifier que la demande d'autorisation qui lui est soumise est fondée ; cette demande doit comporter tous les éléments d'information de nature à justifier la visite. La visite et la saisie s'effectuent sous l'autorité et le contrôle du juge qui les a autorisées. Il désigne un ou plusieurs officiers de police judiciaire chargés d'assister à ces opérations et de le tenir informé de leur déroulement. Lorsqu'elles ont lieu en dehors du ressort de son tribunal de grande instance, il délivre une commission rogatoire pour exercer ce contrôle au président du tribunal de grande instance dans le ressort duquel s'effectue la visite. Le juge peut se rendre dans les locaux pendant l'intervention. A tout moment, il peut décider la suspension ou l'arrêt de la visite. L'ordonnance mentionnée au premier alinéa du présent article n'est susceptible que d'un pourvoi en cassation selon les règles prévues par le code de procédure pénale. Ce pourvoi n'est pas suspensif. La visite, qui ne peut commencer avant six heures ou après vingt et une heures, est effectuée en présence de l'occupant des lieux ou de son représentant. Les enquêteurs, l'occupant des lieux ou son représentant ainsi que l'officier de police judiciaire peuvent seuls prendre connaissance des pièces et documents avant leur saisie. Les inventaires et mises sous scellés sont réalisés conformément à l'article 56 du code de procédure pénale. Les originaux du procès-verbal et de l'inventaire sont transmis au juge qui a ordonné la visite. Les pièces et documents qui ne sont plus utiles à la manifestation de la vérité sont restitués à l'occupant des lieux.

Art. 49: Le président du Conseil de la concurrence est informé sans délai du déclenchement et de l'issue des investigations mentionnées à l'article 48 lorsqu'elles ont été diligentées à l'initiative du ministre chargé de l'économie et qu'elles se rapportent à des faits susceptibles de relever des articles 7 et 8 ci-dessus. Il peut proposer au conseil de se saisir d'office.

Art. 50: Le président du Conseil de la concurrence désigne, pour l'examen de chaque affaire, un ou plusieurs rapporteurs. A sa demande, l'autorité dont dépendent les agents visés à l'article 45 désigne les enquêteurs et fait procéder sans délai à toute enquête que le rapporteur juge utile. Ce dernier définit les orientations de l'enquête et est tenu informé de son déroulement.

Art. 51: Les enquêteurs peuvent, sans se voir opposer le secret professionnel, accéder à tout document ou élément d'information détenu par les services et établissements de l'Etat et des autres collectivités publiques.

Art. 52: Sera puni d'un emprisonnement de six mois et d'une amende de 50 000 F , ou de l'une de ces deux peines seulement, quiconque se sera opposé, de quelque façon que ce soit, à l'exercice des fonctions dont les agents désignés à l'article 45 et les rapporteurs du Conseil de la concurrence sont chargés en application de la présente ordonnance.

Art. 52-1: Le fait, en diffusant, par quelque moyen que ce soit, des informations mensongères ou calomnieuses, en jetant sur le marché des offres destinées à troubler les cours ou des sur offres faites aux prix demandés par les vendeurs, ou en utilisant tout autre moyen frauduleux, d'opérer ou de tenter d'opérer la hausse ou la baisse artificielle du prix de biens ou de services ou d'effets publics ou privés, est puni de deux ans d'emprisonnement et de 200 000 F d'amende . Lorsque la hausse ou la baisse artificielle des prix concerne des produits alimentaires, la peine est portée à trois ans d'emprisonnement et 300 000 F d'amende. Les personnes physiques coupables des infractions prévues au présent article encourent également les peines complémentaires suivantes : 1° L'interdiction des droits civiques, civils et de famille, suivant les modalités de l'article 131-26 du code pénal ; 2° L'affichage ou la diffusion de la décision prononcée dans les conditions prévues par l'article 131-35 du code pénal.

Art. 52-2: Les personnes morales peuvent être déclarées responsables pénalement dans les conditions prévues par l'article 121-2 du code pénal des infractions définies aux deux premiers alinéas de l'article 52-1 de la présente ordonnance. Les peines encourues par les personnes morales sont : 1° L'amende, suivant les modalités prévues par l'article 131-38 du code pénal ; 2° Les peines mentionnées aux 2°, 3°, 4°, 5°, 6° et 9° de l'article 131-39 du même code. L'interdiction mentionnée au 2° de l'article 131-39 du même code porte sur l'activité dans l'exercice ou à l'occasion de l'exercice de laquelle l'infraction a été commise.

Titre VII (Dispositions diverses)

Art. 53 Les règles définies à la présente ordonnance s'appliquent à toutes les activités de production, de distribution et de services, y compris celles qui sont le fait de personnes publiques notamment dans le cadre de conventions de délégation de service public.

Art. 54: La juridiction peut condamner solidairement les personnes morales au paiement des amendes prononcées contre leurs dirigeants en vertu des dispositions de la présente ordonnance et des textes pris pour son application.

Art. 55: En cas de condamnation au titre des articles 31, 32, 34 et 35, la juridiction peut ordonner que sa décision soit affichée ou diffusée dans les conditions prévues par l'article 131-10 du code pénal. Lorsqu'une personne ayant fait l'objet, depuis moins de deux ans, d'une condamnation pour l'une des infractions définies par les articles 28 et 31 à 35 commet la même infraction , le maximum de la peine d'amende encourue est porté au double. Lorsqu'une personne morale ayant fait l'objet, depuis moins de deux ans, d'une condamnation pour l'une des infractions définies par les articles 31 à 33 commet la même infraction, le taux maximum de la peine d'amende encourue est égal à dix fois celui applicable aux personnes physiques pour cette infraction.

Art. 56: Pour l'application de la présente ordonnance, le ministre chargé de l'économie ou son représentant peut, devant les juridictions civiles ou pénales, déposer des conclusions et les développer oralement à l'audience. Il peut également produire les procès-verbaux et les rapports d'enquête.

Art. 56 bis: Pour l'application des articles 85 à 87 du Traité de Rome, le ministre chargé de l'économie et les fonctionnaires qu'il a désignés ou habilités conformément aux dispositions de la présente ordonnance, d'une part, le Conseil de la concurrence, d'autre part, disposent des pouvoirs qui leur sont reconnus par les titres III, VI et VII de la présente ordonnance, pour ce qui concerne le ministre et les fonctionnaires susvisés, et par son titre III pour ce qui concerne le Conseil de la concurrence. Les règles de procédure prévues par ces textes leur sont applicables.

Art. 56 ter: Les organisations professionnelles peuvent introduire l'action devant la juridiction civile ou commerciale pour les faits portant un préjudice direct ou indirect à l'intérêt collectif de la profession ou du secteur qu'elles représentent, ou à la loyauté de concurrence.

Art. 57: Sont abrogés: Le 2° de l'article 419 du code pénal ; L'ordonnance n° 45-1484 du 30 juin 1945 relative à la constatation, la poursuite et la répression des infractions à la législation économique ; La loi du 4 avril 1947 complétant et modifiant la législation économique ; La loi n° 51-356 du 20 mars 1951 modifiée portant interdiction du système de vente avec timbres, primes ou tous autres titres analogues ou avec primes en nature ; La loi n° 77-806 du 19 juillet 1977 relative au contrôle de la concentration économique et à la répression des ententes illicites et abus de position dominante ; Le second alinéa de l'article 45 de la loi n° 73-1193 du 27 décembre 1973 d'orientation du commerce et de l'artisanat ; L'article 49 de la loi de finances du 14 avril 1952 ; Les dispositions du troisième alinéa de l'article L. 310-3 ainsi que les dispositions du troisième et du quatrième alinéa de l'article L. 310-5 du code des assurances.

Art. 58: Les articles 8-3 et 35 de la loi n° 82-1153 du 30 décembre 1982 d'orientation des transports intérieurs sont abrogés. Les articles 32 et 33 du décret n° 49-1473 du 14 novembre 1949 relatif à la coordination et à l'harmonisation des transports ferroviaires et routiers sont maintenus provisoirement en vigueur jusqu'au 31 décembre 1991. Cette date peut être avancée par décret. Dès lors qu'elle constitue un élément d'évolution vers la libre concurrence, peut être établie par décret une procédure contribuant à l'information sur les coûts des transports routiers de marchandises et facilitant la gestion des entreprises.

Art. 59: Le ministre chargé de l'économie reste compétent dans les conditions prévues aux articles 53, 54, 56 et 57 de l'ordonnance n° 45-1483 du 30 juin 1945 pour se prononcer sur les avis rendus par la commission de la concurrence antérieurement à l'entrée en vigueur de la présente ordonnance. Il reste également compétent dans les conditions fixées à l'article 55 de ladite ordonnance si la consultation du président de la commission de la concurrence prévue au même article est déjà intervenue. Si le rapport prévu par l'article 52 de l'ordonnance n° 45-1483 du 30 juin 1945 a déjà été notifié aux parties intéressées, celles-ci disposent d'un délai de deux mois à compter de la date de la notification pour présenter leurs observations ; elles peuvent consulter les mémoires des autres parties dans les conditions prévues au dernier alinéa de l'article 21 de la présente ordonnance. Les pouvoirs dévolus au ministre chargé de l'économie en application des articles 53 et 54 de l'ordonnance n° 45-1483 du 30 juin 1945 sont exercés par la commission de la concurrence et, à compter de son installation, par le Conseil de la concurrence. Demeurent valables les actes de constatation et de procédure établis conformément aux dispositions de l'ordonnance n° 45-1483 du 30 juin 1945, et notamment ses articles 52 à 55, et de l'ordonnance n° 45-1484 du 30 juin 1945.

Art. 61: A titre transitoire, demeurent en vigueur les arrêtés réglementant, en application de l'ordonnance n° 45-1483 du 30 juin 1945, les prix des secteurs et des zones visés au deuxième alinéa de l'article 1er de la présente ordonnance et énumérés au décret prévu à l'article suivant. Les dispositions de l'ordonnance n° 45-1483 du 30 juin 1945 demeurent en vigueur pour la réglementation du papier de presse.

Art. 62: Un décret en Conseil d'Etat détermine les modalités d'application de la présente ordonnance. Le titre Ier entrera en vigueur le 1er janvier 1987.

7 Sherman Act (Title 15, chapter 1 of the US Code)

Sec. 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Sec. 2 (Monopolizing trade a felony; penalty): Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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